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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

RICKY MALLORY, BRAHEEM LEWIS, and HAKIM LEWIS,
Respondents

On Petition for Writ of Certiorari to the
Pennsylvania Supreme Court

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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Question Presented

Respondents, criminal defendants convicted of an attempted murder plot, alleged in post-conviction proceedings that their trial lawyers were ineffective for urging them to accept a bench trial rather than a jury trial.

The Pennsylvania Supreme Court, relying on *Hill v. Lockhart*, held that the requirement of proving prejudice in the "proceeding" does not apply to the result of the trial; rather it applies only to the particular stage of the trial at which the ineffectiveness occurred. Therefore, respondents were entitled to relief merely by asserting that, but for their lawyers' actions, they would not have agreed to a bench trial.

The following question is presented:

Can a criminal defendant establish ineffective assistance of counsel for failing to ensure a valid jury trial waiver, without showing that the alleged ineffectiveness had any effect on the verdict or sentence?

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Order and Opinion Below

The order below is the ruling of the highest state court, the Pennsylvania Supreme Court. The order vacated the denial of post-conviction relief by the Pennsylvania Superior Court, and remanded for appropriate disposition of respondents' claim of ineffective assistance of counsel concerning waiver of the right to a jury trial. The opinion of the Pennsylvania Supreme Court is reported at 941 A.2d 686, and is reprinted in the Appendix at App. 1-44.

Statement of Jurisdiction

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the judgment of the Pennsylvania Supreme Court construing the Sixth Amendment to the United States Constitution.

Constitutional Provision Involved

The Sixth Amendment to the United States Constitution, which provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.

Statement of the Case

Respondents were associates charged with shooting a former drug partner. Respondents retained private attorneys and signed detailed written colloquies waiving their right to a jury. After a three-day bench trial, they were convicted of attempted murder and related offenses. On post-conviction review, respondents alleged that their lawyers were guilty of ineffective assistance of counsel for allowing the jury waiver against respondents' true will. The Pennsylvania Supreme Court, overturning the denial of relief, ruled below that such ineffectiveness allegations require no showing of prejudice in relation to the verdict or sentence, and remanded for disposition of the claim.

The events in question began in late 1995. Respondents Braheem and Hakim Lewis pooled several thousand dollars with the victim, Dante Hunter, to begin a cocaine-selling operation. After several months, some of the proceeds and drugs turned up missing from a safehouse. The partners quarreled and ended the relationship (N.T. 9/15/98, 12-24).

On the morning of August 27, 1996, a cohort of the Lewis's arranged a meeting with the victim to discuss their dispute. When the victim drove up in his car, the three respondents opened fire from

opposite sides of the street. The victim tried to speed away, crashed, and then fled on foot. One of the bullets hit him in the face, knocking out his teeth. Thirty-seven fired cartridge cases were recovered from the scene. (N.T. 9/15/98, 45-60; 9/16/98, 81).

When the scheduled trial day arrived, each of the respondents filled out four-page, 39-question jury waiver colloquy forms. The forms explained in detail the rights associated with trial by jury. Respondents also initialed each page and signed declarations certifying that they had discussed the matter with their lawyer and understood the information in the colloquy. The lawyers and the prosecutor also signed the forms. The trial judge confirmed in open court that the forms had been completed. Although there was no oral colloquy, neither respondents nor their retained counsel expressed any objection to the procedure. App. 5-7.

On September 17, 1998, the trial judge returned verdicts of guilty. Respondents appealed. One was represented by trial counsel on appeal, while the others retained new counsel. None of the respondents raised any claim on appeal concerning the jury waiver. App. 7-9.

The Pennsylvania Superior Court (the intermediate appellate court) affirmed the judgments of sentence on direct appeal, and the

Pennsylvania Supreme Court denied discretionary review. App.8-9.

Respondents then filed petitions in Philadelphia Common Pleas court under the Pennsylvania Post-Conviction Relief Act. Respondent Mallory was appointed new counsel; the others retained new counsel. In their petitions, respondents alleged, for the first time, that they had not really wanted a non-jury trial, and that their trial counsel were ineffective for not ensuring a voluntary waiver. App. 9.[1]

A new judge was assigned to the case and post-conviction hearings were conducted. Respondents testified that they were rushed into the jury waiver at the last minute, and thought they had to go along with counsel's advice. Counsel testified that they had originally planned on a jury trial, but that all the attorneys became convinced by the day of trial that a non-jury proceeding had a better chance of a favorable result. While they acknowledged advocating that strategy to their clients, they did not attempt to coerce a waiver (N.T. 11/24/03, Mallory hearing, 7-13, 25-26, 30-32; N.T. 11/24/03, Lewis hearing, 9, 18, 29-35, 43-44; N.T. 12/4/03, 6-7, 16-18, 21, 23-26).

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[1]Respondents also claimed that direct appeal counsel were ineffective for not raising the issue.

Following the hearings, the post-conviction court ruled that, in the absence of an oral colloquy, respondents did not fully understand their rights; thus the waivers were involuntary and counsel were ineffective for failing to raise the issue. The court granted respondents a new trial, and dismissed their remaining post-conviction claims as moot. App. 12-14, 73-79, 82-88, 91-97.

The Commonwealth appealed, arguing, *inter alia*, that respondents had failed to establish the necessary actual prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984). Respondents answered that prejudice should be presumed. The Pennsylvania Superior Court rejected that argument, holding that respondents could not establish ineffective assistance of counsel, because they had not shown a reasonable probability that they would have achieved a more favorable result with a jury trial than with a non-jury trial. The court therefore vacated the new trial grant and remanded for consideration of respondents' remaining post-conviction claims. The court subsequently denied respondents' petition for reargument. App. 14-15, 67-70.

After granting discretionary review, the Pennsylvania Supreme Court reversed. The Court observed that written jury waivers are not per se invalid, and – nominally, at least – declined to "presume" prejudice in the jury waiver ineffective assistance context. App. 22-23, 36-38.

Nonetheless, the Court held that, in such cases, the defendant need not make any showing that he would have secured a better result with a jury. Instead, the defendant need only establish that, but for his attorney's actions, there is a reasonable probability that he would have made a different decision about waiver. App. 38-42.

Having therefore effectively disposed of the prejudice component of respondents' ineffectiveness claim, the court relinquished jurisdiction and remanded to allow the post-conviction hearing judge to enter a finding on the only remaining issue: whether, under all the circumstances, counsel performed deficiently by relying on the written jury waiver forms rather than insisting on oral colloquies. App. 42-44.

Because the hearing judge has already indicated his views on that question, and because the Pennsylvania Supreme Court's ruling establishes an incorrect standard for the assessment of Sixth Amendment claims in all similar cases, petitioner seeks this Court's review.

Reasons for Granting the Petition

I. The proper prejudice standard to be applied to jury waiver ineffectiveness claims presents an important question of constitutional law.

In *Strickland v. Washington*, 466 U.S. 668 (1984), this Court set the legal test for judging claims by a criminal defendant that his lawyer provided such poor representation as to deprive him of the right to counsel under the Sixth Amendment. The defendant is required to demonstrate not only that counsel's performance was deficient, but also that it prejudiced the defense. *Id.* at 687. To establish such prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, *the result of the proceeding* would have been different." *Id.* at 694 (emphasis supplied).

Although *Strickland* was decided 24 years ago, the Court has not yet determined the precise contours of the phrase, "result of the proceeding." In particular, does this language pertain to the result of the trial as a whole, or to some piece of it? This case illustrates the importance of that unresolved question.

The Pennsylvania Supreme Court held here that a defendant alleging ineffective assistance in regard to a decision to waive a jury trial need not show that his attorney's actions had any effect on the verdict or sentence; rather, it is sufficient to establish that, but for counsel's conduct, the defendant would not have agreed to a non-jury trial. The rationale for this ruling is that *Strickland*'s prejudice requirement – that the outcome of the "proceeding" would have been different – refers not to the outcome of the trial, but only to *the specific stage of the trial* at which the ineffectiveness allegedly occurred. App. 38-42.

This issue has significant ramifications both within and well beyond the jury waiver context.

Since *Strickland*, innumerable defendants in the state and federal courts have raised claims alleging that their lawyers provided ineffective assistance concerning the decision to go to trial without a jury. The correct standard to be applied in assessing *Strickland*'s prejudice component, obviously, affects results in these cases at the appellate and post-conviction levels.

Moreover, to the extent that the burden of proving prejudice is lessened or essentially eliminated for jury waiver ineffectiveness claims, there is also an effect at the pre-trial level. Such claims typically involve events that are outside the power of judges to control completely during the

jury waiver process itself. But courts are not required to allow jury waivers at all; there is no constitutional right to a non-jury trial. *Singer v. United States*, 380 U.S. 24 (1965). Judges must therefore choose between permitting jury waivers, and risking possible reversal and retrial, or prohibiting jury waivers, and risking possible overload of already strained judicial resources.

Even more important, however, are the implications of this open question for ineffectiveness claims generally. If the trial process may be subdivided for purposes of assessing prejudice, then the prejudice requirement becomes virtually meaningless. How is it possible to ascertain prejudice from, for example, the manner in which counsel conducts *voir dire*, or the election to make an opening or closing argument, or the decision whether to present a defense case at all? At least, how is it possible without regard to the effect of these actions on the verdict or the sentence? If the prejudice inquiry is confined to the particular stage of trial – in other words, if the only question is whether the "result" of that specific "proceeding" would have been different but for counsel's actions – then the answer is automatic.

This case provides an appropriate opportunity to enunciate whether *Strickland* prejudice must be measured in whole (as an effect on the verdict or sentence), or in part (in relation only to the particular stage at which the

ineffectiveness allegedly occurred). And while *Strickland* itself did not explicitly answer that question, it provides considerable guidance for determining the proper standard.

Throughout the *Strickland* opinion, the Court's language makes clear that the prejudice component is concerned with overall outcomes, not particular acts.

> In giving meaning to the requirement [of effective assistance], we must take its purpose – to ensure a fair trial – as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result

466 U.S. at 686. Indeed the very first sentence of the Court's discussion of prejudice declares that alleged incompetence does not warrant relief "if the error had no effect on the *judgment*." 466 U.S at 691 (emphasis supplied).

The facts of the case also support this broad view of prejudice. *Strickland* addressed a claim of ineffective assistance arising from a capital sentencing proceeding. The Court observed that such a proceeding is akin to a trial in its own right, due to its format and standards for decision. 466

U.S. at 686. But the specific structure of a capital sentencing proceeding is less important than the simple fact that its result constituted the very judgment the defendant sought to set aside.

That is not the case with the "stage of trial" approach employed by the Pennsyvlania Supreme Court, and by other courts (*see infra*). A defendant alleging jury waiver ineffectiveness, for example, does not just want to set aside his jury waiver. The only way to do so would be to vacate the judgment of sentence and award a new trial. That is the real goal of such a claim.

Accordingly, the extent of the prejudice inquiry should correspond to the extent of the relief sought. If the defendant seeks a new trial, then allegations of prejudicial counsel error must be measured in relation to their effect on the overall verdict. The same must be true for a challenge to the sentence. In no case, however, is a Sixth Amendment violation properly established where the defendant alleges merely that a specific stage of the proceedings would have been different had counsel not erred.

This Court should grant review, or issue summary relief, in order to clarify the law.

II. The circuits, and state courts, are in conflict on the nature of the prejudice required for jury waiver ineffectiveness claims.

Jury waiver ineffectiveness claims provide a compelling example of the unsettled application of *Strickland*'s "result of the proceeding" language. There is a sharp conflict between courts that assess prejudice from such claims in relation to the verdict or sentence, and those that do not. The point of distinction is whether the "proceeding" is seen as the trial in its entirety, or whether instead the jury waiver determination is treated as a discrete stage within the trial process.

The leading authority for the latter view is the 8th Circuit. In *McGurk v. Stenberg*, 163 F.3d 470 (8th Cir. 1998), the court of appeals held that the attorney's failure to advise the defendant properly constituted a constructive denial of counsel as to the right to a jury trial. Relying on *United States v. Cronic*, 466 U.S. 648 (1984), the court held that the denial of effective assistance at the jury selection stage called for a presumption of prejudice, and thus the award of a new trial without regard to any effect on the verdict or sentence. *Accord Miller v. Dormire*, 310 F.3d 600 (8th Cir. 2003) (attorney waived jury without explaining rights to defendant, who was present;

state court acted unreasonably in not presuming *Strickland* prejudice).

Although no other federal courts of appeal have followed the 8th Circuit position, several states have done so:

Florida: *Abrams v. State*, 777 So. 2d 1205 (Fla. Dist. Ct. App. 2001) (citing *McGurk*).

Indiana: *Stevens v. State*, 689 N.E.2d 487, 490 (Ind. Ct. App. 1997) ("in certain circumstances, prejudice from defense counsel's performance will be presumed for purposes of ineffective assistance of counsel claims"; citing *Cronic*).

Iowa: *State v. Stallings*, 658 N.W.2d 106 (Iowa 2003) (citing *McGurk*).

Kansas: *City of Wichita v. Bannon*, 154 P.3d 1170, 1174-75 (Kan. Ct. App. 2007) (citing *McGurk*).

In contrast, several circuits have held that, where a defendant claims that his lawyer's ineffectiveness deprived him of a jury trial, he must show that the result of a jury trial would likely have been more favorable than the non-jury trial he actually had:

4th Circuit: *Correll v. Thompson*, 63 F.3d 1279, 1292 (4th Cir. 1995) ("[T]he evidence against Correll was overwhelming, and we have no doubt that had

the case been presented to a jury the same result would have obtained").

5th Circuit: *Green v. Lynaugh*, 868 F.2d 176, 178 (5th Cir. 1989) ("Aside from the speculation by the magistrate that a jury might have deadlocked over the evidence presented, there is nothing in the record to indicate that, in the absence of defense counsel's errors, a *different* fact finder (i.e. a jury) would have been reasonably likely to arrive at a different outcome").

6th Circuit: *Willis v. Smith*, 351 F.3d 741, 746 (6th Cir. 2003) ("Even if Willis's counsel performed in an objectively unreasonable manner, Willis cannot show 'reasonable probability' that 'the result of the proceeding would have been different' but for his counsel's errors. *Strickland*, 466 U.S. at 694. Willis has presented no evidence that the judge's rulings were biased in any way or that the trial was otherwise unfair. Moreover, Willis's conviction was fully supported by the overwhelming evidence presented by the government"); *Spytma v. Howes*, 313 F.3d 363, 372 (6th Cir. 2002) ("If . . . petitioner had received a jury trial . . ., it is likely that he would have been found guilty, given the overwhelming evidence of guilt").[2]

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[2]*See also*:

9th Circuit: *Robinson v. United States*, 1991 U.S. App.

(continued...)

Pennsylvania has tried to straddle the divide between these two lines of authority – unsuccessfully. The Pennsylvania Supreme Court claimed here that its approach was neither to presume prejudice, as in the Eighth Circuit cases, nor to demand a showing that the verdict or sentence would have been different. Rather, the court said, the defendant could prevail merely by demonstrating that ineffectiveness by counsel changed the result *of the jury waiver proceeding*. In other words, the defendant's burden is only to establish that counsel's actions caused him to

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[2](...continued)
LEXIS 131166 (9th Cir. 1991) (unpublished) (rejecting ineffective assistance claim based on counsel's advise to waive jury; "[n]or has she shown that trial by judge, as opposed to jury, constitutes prejudice"); *United States v. Craig*, 1992 U.S. App. LEXIS 14179 (9th Cir. 1992) (unpublished) (rejecting alleged ineffectiveness based on waiver of right to jury trial; under circumstances, defendant was "not prejudiced as the result of having a bench trial rather than a jury trial")

Illinois: *People v. Williams*, 576 N.E.2d 68, 76 (Ill. App. Ct. 1991) (no prejudice under *Strickland* from counsel's decision to waive jury trial)

Ohio: *State v. Emch*, 2002 Ohio 3861, ¶38 (Ohio Ct. App. 2002) (applying *Strickland* standard; "[a]ppellant also failed to demonstrate prejudice based on his jury waiver. Appellant presented no evidence, or even arguments, that had the trial been conducted before a jury rather than a judge, the result would have been different").

choose a non-jury trial when, left to his own devices, he would have elected a jury trial.

The Pennsylvania Supreme Court insisted that this diminished showing still amounted to "actual prejudice," but it was no such thing. What the court called actual prejudice was actually just causation. Prerequisite to any kind of prejudice claim – presumed or actual – is a showing that the thing the defendant lost was in fact the product of the thing the lawyer did. *Roe v. Flores-Ortega*, 528 U.S. 470, 484 (2000) (distinguishing between actual and presumed prejudice, but requiring in either case "that counsel's deficient performance must actually cause" the prejudice alleged).

Thus the Eighth Circuit, which unabashedly presumes prejudice for ineffective assistance claims concerning jury trial waivers, nevertheless requires the defendant to establish "that he would have insisted on a jury trial" but for counsel's alleged poor advice. *Nelson v. Hvass*, 392 F.3d 320, 324 (8th Cir. 2004). The bottom line is that the Pennsylvania ruling is consistent with the Eighth Circuit line of cases: if a defendant followed improper advice to waive the right to a jury trial, the court must presume the trial was unfair and must grant a new one.

This Court has made clear that *United States v. Cronic*, allowing a presumption of prejudice in certain ineffective assistance of counsel cases,

recognized only "a narrow exception to *Strickland*'s holding" requiring actual prejudice. The Court has emphasized "just how infrequently the surrounding circumstances will justify a presumption of ineffectiveness." *Florida v. Nixon*, 543 U.S. 175, 190 (2004). Yet the temptation of at least some courts to dispense with concrete prejudice – an effect on the verdict or sentence – in the jury waiver ineffectiveness context suggests that the line between *Strickland*'s actual prejudice and *Cronic*'s presumed prejudice remains unclear. The Court should grant review to resolve the conflicting views of the lower courts.

III. This Court's decision in the related context of guilty plea ineffectiveness claims, *Hill v. Lockhart*, has created uncertainty and should be clarified.

The Pennsylvania Supreme Court did not come to its narrow approach to *Strickland* prejudice simply by considering other cases concerning jury waiver ineffectiveness. Rather, the court looked to this Court's decision in *Hill v. Lockhart*, 474 U.S. 52 (1985), which addressed a claim by a defendant who pleaded guilty, allegedly as a result of his lawyer's bad advice. The Pennsylvania court understood *Hill* to establish that the "proceeding" for which prejudice must be assessed is not the trial as such; instead, the relevant "proceeding" can be

any distinct step in the criminal process that has its own result. App. 39-40.

On this point, however, *Hill* sent mixed signals, which have caused conflicting rulings in the lower courts. On the one hand, *Hill* contains language indicating that prejudice is just the likelihood of a different plea decision, not a different verdict or sentence. "The . . . 'prejudice' requirement . . . focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. . . . [T]he defendant must show that . . . but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." 474 U.S. at 59.

On the other hand, the *Hill* Court instructed lower courts to resolve prejudice claims – at least "[i]n many guilty plea cases" – by examining the impact of the alleged ineffectiveness on the conviction, not just on the plea decision. The necessary prejudice assessment "will depend in large part" on whether better performance by plea counsel "likely would have changed the outcome of a trial." *Id.* Indeed *Hill* explicitly relied, *id.* at 59 & n.*, on two circuit court decisions that required such prejudice in the plea context.[3]

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[3]*Mitchell v. Scully*, 746 F.2d 951, 954-55 (2nd Cir. 1984) (Friendly, J.) (in guilty plea cases, as in cases of trial to verdict, defendant claiming ineffective assistance of counsel

(continued...)

Furthermore, later in that same Term the *Hill* Court also decided the case of *Kimmelman v. Morrison*, 477 U.S. 365 (1986), addressing ineffective assistance in the context of a suppression hearing. Certainly a suppression hearing, like the guilty plea process, could be characterized as a separate "proceeding" with an independent "result" addressing an important constitutional right. Yet the Court in *Kimmelman*, after reiterating that *Strickland* prejudice requires a showing that "the result of the proceeding would have been different," specifically held that the defendant must "prove that his Fourth Amendment claim is meritorious *and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to*

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[3](...continued)
must show that result of proceeding would have been not just different, but *more favorable to him*; "[h]ere there was exceedingly little likelihood that presentation of [a] . . . defense would have succeeded with respect to the first degree robbery charge to which Mitchell pleaded guilty. . . . Even in the unlikely event that Mitchell had succeeded in defeating the first degree robbery . . ., his own testimony . . . would have convicted him of second degree robbery, on which he could have been subject to ... the same . . . sentence he actually received"); *Evans v. Meyers*, 742 F.2d 371, 374-75 (7th Cir. 1984) (Posner, J.) (prejudice standard no different for guilty plea ineffectiveness claims than for trial ineffectiveness claims; inconceivable that defendant would have gone to trial, "or that if he had done so he either would have been acquitted or, if convicted, would nevertheless have been given a shorter sentence than he actually received").

demonstrate actual prejudice." *Id.* at 375 (emphasis supplied).

The resulting uncertainty on *Hill*'s meaning has led to significant conflicts in the lower courts, both between and within circuits, and among state courts. Many courts hold that a defendant alleging ineffective assistance in connection to a guilty plea need show only that, but for counsel's conduct, the defendant would not have entered the plea. Other courts, however, maintain that the defendant must demonstrate a reasonable probability that the outcome of a trial would have been more favorable.[4]

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[4] *See, e.g.*:

6th Circuit: *Short v. United States*, 471 F.3d 686, 691 (6th Cir. 2006) (*Hill* "modified *Strickland*'s prejudice prong," requiring showing that plea decision (rather than trial outcome) would have been different).

7th Circuit: *Compare Haase v. United* States, 800 F.2d 123, 128 (7th Cir. 1986) (guilty plea counsel performed deficiently in failing to explore *scienter*, but for charges at issue, lack of such intent "is not a defense. Haase, thus, has not satisfied the second prong of the *Strickland* standard"), *with St. Pierre v. Walls*, 297 F.3d 617, 628 (7th Cir. 2002) ("In the context of guilty pleas, . . . the prejudice requirement is altered"; defendant need only show he would not have pleaded guilty).

10th Circuit: *Compare Miller v. Champion*, 161 F.3d 1249 (10th Cir. 1998) (*Miller I*) ("Although Miller's claim would

(continued...)

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[4](...continued)
necessarily fail without such an allegation [that he would not have pleaded guilty], *see Hill*, . . . this allegation alone is insufficient to demonstrate prejudice. . . . Rather, in order to demonstrate prejudice, Mr. Miller must also show that, had he rejected the State's plea bargain, the outcome of the proceedings likely would have changed. . . . Thus, we must determine whether it is likely that a jury would have acquitted"), *with Miller v. Champion*, 262 F.3d 1066, 1073 (10th Cir. 2001) (disavowing *Miller I*'s "expansive language").

Arizona: *State v. Bowers*, 966 P.2d 1023 (Ariz. Ct. App. 1998) ("We reject an understanding of prejudice in the context of a guilty plea which would require a petitioner to demonstrate a more favorable outcome after trial").

District of Columbia: *Smith v. United States*, 686 A.2d 537 (D.C. App. 1996) ("Since the outcome would have been no different in this case had Smith entered a plea, there is no prejudice. *See Hill v. Lockhart*").

Florida: *Grosvenor v. State*, 874 So. 2d 1176, 1179 (Fla. 2004) (*Hill* "has caused much confusion," but defendant should not be required to allege that trial outcome would have been more favorable than plea)

Indiana: *State v. Van Cleave*, 674 N.E.2d 1293, 1297 (Ind. 1996) (concluding that, while "*Hill* itself is not entirely clear on this point, . . . a claim of ineffective assistance of counsel does entail a showing of reasonable probability of a better result at trial").

Mississippi: *Compare Leatherwood v. State*, 539 So. 2d 1378, 1387 (Miss. 1989) ("the trial court impermissibly

(continued...)

The Pennsylvania Supreme Court, again, tried to straddle this divide – but was again unsuccessful. The court, attempting to reconcile (its understanding of) *Hill* with *Kimmelman*, suggested that its holding would be limited. That is, the court's special form of ineffective assistance prejudice – the kind that requires only a causal

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[4](...continued)
exceeded the proper focus for determining whether Leatherwood has shown prejudice by considering the evidence of guilt, and the ultimate likelihood of an acquittal"), *with Mowdy v. State*, 638 So. 2d 738, 742 (Miss. 1994) (no prejudice from counsel's bad plea advice where defendants failed "to delineate facts which, if proven, would show the likelihood of success at trial")

Wyoming: *Compare Rutti v. State*, 100 P.2d 394, 406-08 (Wyo. 2004) ("it is clear that the *Hill* Court was not lessening the prejudice requirements of *Strickland*. . . . The definitive problem with Rutti's ineffective assistance of counsel claims is that he has not presented any objectively plausible argument supporting the prejudice prong. Rutti does not argue that absent the error, the outcome of a trial would have been more advantageous to the client than the result of his plea. . . . This Court has confidence that the outcome was more than fair to Rutti and that the proper functioning of the adversarial process was not undermined by defense counsels' performances. . . . Rutti suffered no prejudice and actually benefitted from a very advantageous plea agreement"), *with Palmer v. State*, 174 P.3d 1298, 1302 (Wyo. 2008) ("We take this opportunity to clarify *Rutti*"; defendant need not allege that outcome of trial would have been more advantageous than plea).

link, without proof of the possibility of a more favorable verdict or sentence – would apply only to the results of proceedings involving "fundamental rights." Other kinds of court proceedings, like suppression hearings, would still require a showing of prejudice in the form of an effect on the verdict or sentence. App. 39, 41-42 n.18.

Nothing in *Hill*, however, nor in *Kimmelman*, let alone in *Strickland*, indicates that the Pennsylvania court's notion of "fundamental rights" has anything to do with the assessment of prejudice to the defendant from deficient performance by an attorney. To begin with, which rights qualify for the special treatment? It is not clear why suppression claims should be excluded, considering that suppression is perhaps the single best chance a defendant has to achieve a favorable outcome in a criminal trial. Meanwhile the right to testify on one's own behalf, which surely merits a place on any list of "fundamental rights," *see, e.g., Jones v. Barnes*, 463 U.S. 745, 751 (1983), and is frequently the subject of ineffective assistance of counsel claims, is routinely analyzed according to the normal rule of *Strickland* prejudice: whether the defendant's testimony would have helped get a better result at trial.[5] *Kimmelman* itself, moreover,

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[5]*See, e.g., Brown v. Artuz*, 124 F.3d 73 (2nd Cir. 1997) (recognizing that right to testify is fundamental and personal to defendant, and that counsel's failure to advise defendant

(continued...)

holds that the right to effective assistance of counsel has a separate identity from any underlying right that counsel may have jeopardized, and that the elements of proving one do not govern the elements of proving the other. 477 U.S. at 374-75.

Despite the efforts of the court below to coin a coherent rule, the difficulty appears to rest with *Hill* itself. The inescapable fact is that, if *Hill* requires *no more than* proof that counsel's deficient performance caused the decision to plead guilty (or, by extension to this case, the decision to waive trial by jury), then it permits simply a causation element, not a true prejudice element. *See Roe v. Flores-Ortega*, 528 U.S. at 484. If it is enough to show that the result of a specific "proceeding" –

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[5](...continued)
on right is deficient performance, but holding that defendant could not establish prejudice under *Strickland*: "[e]ven if Brown had made such statements on the stand, however, there is no reasonable probability that the verdict would have been different"); *United States v. Kimler*,119 Fed. Appx. 213 (10th Cir. 2004) ("there was no reasonable probability that Defendant's testimony would have changed the result in the case"); *Franklin v. United States*, 227 Fed. Appx. 856 (11th Cir. 2007) (rejecting argument that prejudice should be presumed); *United States v. Michael*, 100 F.3d 995 (D.C. Cir. 1996) (declining to presume prejudice; "[w]e conclude that given the facts of the case even the defendant's own testimony would not have influenced the outcome of his trial").

guilty plea colloquy; jury waiver colloquy; waiver-of-testimony colloquy; etc. – would have been different, then the judgment of sentence is effectively deemed unfair, and must be vacated in favor of a new trial. Once, in other words, a court dispenses with the requirement of proving a reasonable probability of a more favorable verdict or sentence, what is left is a presumption of prejudice, not actual prejudice.

To the extent such a sweeping result might be read from the opinion in *Hill*, it is dictum. The defendant there did not establish, or even allege, that he would have pleaded not guilty but for counsel's supposedly inadequate advice. 474 at 60. Absent this threshold showing, it was unnecessary for the Court to decide whether actual prejudice was required to establish a violation of the right to effective representation in relation to plea decisions.

To be sure, some later support for a presumption of prejudice might be gleaned from the opinion in *Roe v. Flores-Ortega*. There the Court cited *Hill*, apparently analogizing the guilty plea decision to an attorney's act in forfeiting the opportunity to appeal, against the wishes of his client. 528 U.S. at 483. In reality, the two are not the same. A plea bargain does not unilaterally forfeit an entire judicial proceeding; rather, it represents an alternative form of disposition, entered into mutually in order to provide a benefit

to both sides. The correct analogy is not to the kind of forfeiture alleged in *Roe*, but to negotiations for a settlement at the appellate stage. A challenge to counsel's guidance in relation to such a process, whether at the appeal stage or at the plea stage, is really a challenge to the fairness of the end result.

To presume prejudice in such circumstances would be flatly inconsistent with the whole course of the Court's development of the law in this area: from its focus in *Strickland*, 466 U.S. at 687, on "a fair trial, a trial whose result is reliable," through its caveat in *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993), that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective," to its emphasis in *Florida v. Nixon*, 543 U.S. at 190, that a presumption of prejudice is an exceedingly narrow exception to the general rule.[6] Guilty pleas

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[6]*See also United States v. Gonzalez-Lopez*, 548 U.S. 140, 147 (2006):

> Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose. . . . The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there – *effective* (not mistake-free) representation. Counsel

(continued...)

and bench trials make up the vast majority of criminal dispositions in this country. If prejudice is to be presumed whenever counsel's performance is challenged in relation to either decision, then the relationship between *Strickland* and *Cronic* will have been turned on its head.

Accordingly, it is appropriate for the Court to clarify the meaning of *Hill v. Lockhart*. Is prejudice indeed to be presumed for guilty plea ineffectiveness claims? And if so, does such a rule extend to jury waiver ineffectiveness claims as well? In the latter case, after all, the defendant did in fact have a full trial in every sense, albeit with a different – but no less inherently fair – finder of fact. *See Strickland*, 466 U.S. at 685, 695 ("a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal"; prejudice "should not depend on the idiosyncracies of the particular decision maker).

The case presents a question worthy of review. Certiorari should be granted.

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[6](...continued)
cannot be "ineffective" unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not "complete" until the defendant is prejudiced.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that this Court grant the petition for writ of *certiorari*.

Respectfully submitted,

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[J-134-2006]
IN THE SUPREME COURT
OF PENNSYLVANIA
EASTERN DISTRICT

CAPPY, C.J., CASTILLE, NEWMAN, SAYLOR, EAKIN, BAER, BALDWIN, JJ.

COMMONWEALTH OF PENNSYLVANIA,	:	No. 28 EAP 2006
	:	
	:	Appeal from the
Appellee	:	Order of the Superior
	:	Court entered on
	:	November 15, 2005 at
	:	No. 869 EDA 2004,
	:	vacating and remand-
v.	:	ing the Order of the
	:	Court of Common
	:	Pleas of Philadelphia
	:	County entered on
	:	March 2, 2004 at No.
	:	9802-0065 1/1
RICKY MALLORY,	:	
	:	888 A.2d 854 (Pa.
Appellant	:	Super. 2005)
	:	
	:	ARGUED: October 18,
	:	2006

COMMONWEALTH OF PENNSYLVANIA,	:	No. 29 EAP 2006
	:	
	:	Appeal from the
Appellee	:	Order of the Superior
	:	Court entered on
	:	November 15, 2005 at
	:	No. 871 EDA 2004,
	:	vacating and remand-
v.	:	ing the Order of the
	:	Court of Common
	:	Pleas of Philadelphia
	:	County entered on
	:	March 2, 2004 at No.
	:	9709-1109 1/1
BRAHEEM LEWIS,	:	
	:	888 A.2d 854 (Pa.
Appellant	:	Super. 2005)
	:	
	:	ARGUED: October 18,
	:	2006
	:	
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	No. 30 EAP 2006
	:	
	:	Appeal from the
Appellee	:	Order of the Superior
	:	Court entered on
	:	November 15, 2005 at
	:	No. 872 EDA 2004,
	:	vacating and remand-
v.	:	ing the Order of the
	:	Court of Common

	:	Pleas of Philadelphia
	:	County entered on
	:	March 2, 2004 at No.
	:	9807-0777 1/1
HAKIM LEWIS,	:	
	:	888 A.2d 854 (Pa.
Appellant	:	Super. 2005)
	:	
	:	ARGUED: October 18,
	:	2006

OPINION

MR. CHIEF JUSTICE CASTILLE*
DECIDED: February 19, 2008

Ricky Mallory, Braheem Lewis, and Hakim Lewis[1] (collectively "appellants") were tried together in a bench trial and found guilty of aggravated assault, attempted murder, and lesser crimes. After their direct appeals were unsuccessful, each appellant later filed a petition seeking collateral relief under the Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. Each appellant alleged, among other claims, that his trial lawyer was ineffective in failing to challenge

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*This matter was reassigned to this author.

[1]Hakim Lewis spelled his name as "Hakeem Lewis" on his written jury trial waiver colloquy. Written Jury Trial Waiver Colloquy of Hakim Lewis at 1.

the knowing, voluntary, and intelligent nature of his jury trial waiver, noting that the trial court, without objection from counsel, had failed to conduct an on-the-record, oral jury waiver colloquy as is contemplated by Pa.R.Crim.P. 620. Following hearings at which appellants and their former counsel testified, the PCRA court held that appellants had proven their claims of ineffective assistance of counsel and granted each appellant a new trial. On the Commonwealth's appeal, the Superior Court reversed, holding that appellants had failed to establish prejudice. Specifically, the Superior Court, citing the lead opinion in *Commonwealth v. Lassiter*, 722 A.2d 657 (Pa. 1998) (Opinion Announcing Judgment of the Court, or "OAJC"), found that they had failed to show that the outcome of their joint trial would have been more favorable if it had been conducted before a jury. For the following reasons, we vacate the order of the Superior Court and remand this matter to the PCRA court for proceedings consistent with this Opinion.

On August 26, 1997, appellants fired multiple shots at Dante Hunter while he was driving down 43rd Street in West Philadelphia. Appellants were later arrested and charged with multiple crimes arising from the incident. On September 15, 1998, appellants appeared for trial before the Honorable Rayford A. Means. Attorney David Mischak represented Mallory, Attorney Tariq El-Shabazz represented Braheem Lewis, and

Attorney Guy Sciolla represented Hakim Lewis. Appellants each entered a plea of not guilty, signed a standard jury trial waiver form, and completed a written jury trial waiver colloquy. The written colloquy contained thirty-nine questions[2] concerning appellants' knowledge and comprehension of the right that they were waiving.

The jury trial waiver forms stated that each appellant understood the following fundamentals of a jury trial:

> (a) the jury would be chosen from members of the community thereby producing a jury of his peers;
> (b) any verdict rendered by a jury must be unanimous, that is, all twelve jurors must agree before they can return a verdict of guilty; and
> (c) he would be permitted to participate in the selection of the jury.

Waiver Form, at 1. The written waivers asked whether appellants understood more specific principles of a jury trial, including: the

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[2]In the Commonwealth's motion to dismiss appellants' PCRA petitions, it stated that appellants answered 42 items in the written jury waiver colloquy. It is not entirely clear how the Commonwealth arrived at that number; this Opinion refers to the number of separately numbered points of inquiry in the written jury trial waiver colloquy.

Commonwealth's burden of proof, the defendant's ability to participate in choosing the jurors, the defendant's ability to challenge and strike jurors and, again, the unanimity requirement for the jury to render a verdict of guilty. Each written colloquy was signed by the respective appellant, his counsel, and the prosecutor. Each appellant initialed each page of his written waiver colloquy, and each signed a declaration on page four of the colloquy confirming that: "I have answered the questions on the above Defendant Information Sheet and I have reviewed this entire matter with my attorney and I understand all of the information given above." Each of those certifications was followed by the signature of defense counsel as a witness.

Also on each form, just below defense counsel's signature, is a "certification" signed by the Assistant District Attorney, stating that she had asked the defendant if there was anything he did not understand on the written waiver colloquy form, or if there was anything else he did not understand, that the defendant indicated his understanding of everything set forth in the form, and that any questions concerning the waiver of a jury had been answered by his attorney. On the bottom of the fourth page is a certification for the trial court to execute which states, *inter alia*, that the court is "satisfied that the defendant fully understands the nature and quality of the Jury Trial Waiver." The trial judge signed that certification on the written waiver colloquies of appellants

Mallory and Hakim Lewis, but did not sign it on Braheem Lewis's written colloquy.

In open court, the trial judge, after being informed that the parties were seeking a non-jury trial, asked if the "waiver colloquies are done and the Assistant District Attorney has signed it." Notes of Testimony ("N.T.") Waiver Trial, 9/15/98, at 4-5. The prosecutor responded in the affirmative. After discussion of an unrelated issue, the court then noted that it had signed each of the written jury waivers. *Id.* at 8. None of the appellants or their counsel objected to the jury waiver process. Although the trial court acknowledged on the record that the waivers had been signed by each appellant, the trial court did not conduct an on-the-record oral waiver colloquy for appellants. Nor did any appellant request an oral colloquy. The case then immediately proceeded to a joint bench trial.

On September 17, 1998, Judge Means found each appellant guilty of attempted murder,[3] aggravated assault,[4] possession of an instrument of

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[3]18 Pa.C.S. §§ 901 (criminal attempt), 2502 (murder).

[4]18 Pa.C.S. § 2702.

crime,[5] violation of the Uniform Firearms Act,[6] criminal conspiracy,[7] and recklessly endangering another person.[8] On October 5, 1998, the trial court denied appellants' post-verdict motions and sentenced each appellant to an aggregate sentence of forty-five to ninety years of imprisonment. Appellants filed motions for reconsideration, which were granted in part as each aggregate was reduced to thirty-five to seventy years of imprisonment.[9] Appellants' motions for reconsideration based on after-discovered evidence were denied Thereafter, appellants filed appeals to the Superior Court, which affirmed their judgments of sentence.[10] This Court declined further discretionary review of each appeal. *See Commonwealth v. Braheem Lewis*, 761 A.2d 548 (Pa. 2000) (Table);

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[5]18 Pa.C.S. § 907(b).

[6]18 Pa.C.S. § 6108.

[7]18 Pa.C.S. § 903.

[8]18 Pa.C.S. § 2705.

[9]Appellants were originally sentenced to ten to twenty years for aggravated assault, but those sentences were vacated.

[10]The Lewises filed a consolidated direct appeal to the Superior Court on February 25, 1999, which affirmed their judgments of sentence on April 19, 2000. Mallory filed his direct appeal on March 12, 1999, and his judgment of sentence was affirmed by the Superior Court on July 3, 2000.

Commonwealth v. Mallory, 766 A.2d 1245 (Pa. 2000) (Table); *Commonwealth v. Hakim Lewis*, 781 A.2d 141 (Pa. 2001) (Table). During their direct appeals, the Lewises were jointly represented by new counsel, F. Emmett Fitzpatrick, Esquire, and Mallory was represented by his trial counsel.

On November 28, 2001, the Lewises filed counseled petitions for relief under the PCRA. On December 11, 2001, Mallory filed a *pro se* PCRA petition and he was appointed counsel. Amended petitions were filed. Each appellant claimed, *inter alia*, that his trial counsel was ineffective for failing to challenge the voluntary, knowing, and intelligent nature of his jury trial waiver. Evidentiary hearings were held by the PCRA court on November 24, 2003 and December 4, 2003.

Mallory testified and claimed that he would have opted for a jury trial if the trial court had conducted an on-the-record, oral jury waiver colloquy. N.T. PCRA Hearing, 11/24/03, at 6-7, 14. Mallory further claimed that he had signed his written jury waiver only because he thought he had to sign because his co-defendants had already signed their waiver documents when he arrived in the courtroom. Mallory also testified that: he reviewed the written waiver colloquy for approximately ninety seconds prior to signing; he did not actually read the waiver colloquy during those ninety seconds; his trial counsel did not review the waiver colloquy with him; and he and his trial

counsel never discussed a bench trial. *Id.* at 9-10, 16. Mallory's trial lawyer, Attorney Mischak, testified that, during his pretrial discussions with Mallory, it was clear that his client preferred a jury trial. Mischak could no longer recall whether he went over the jury waiver form with Mallory, but noted that it was his practice to explain to his clients in waiver trials that they had a personal right to a jury trial, and that he would not have done anything to coerce a jury waiver. Mischak further testified that it was Attorney Sciolla, Hakim Lewis' lawyer, who first suggested proceeding with a bench trial, a suggestion made on the morning of trial. *Id.* at 24-26, 30-32.

Attorney El-Shabazz testified that all of his discussions with his client, appellant Braheem Lewis, had centered on proceeding with a jury trial, with the exception of the day of trial. N.T. PCRA Hearing, 12/4/03, at 6-7. Furthermore, El-Shabazz testified that, after speaking with Attorney Sciolla, he believed that a bench trial offered his client a better prospect of a favorable verdict. El-Shabazz thus recommended to his client that he should waive a jury. He further testified that he explained the written colloquy to his client, who understood what he was waiving. El-Shabazz added that he believed his client "was waiving his right to a jury definitely knowingly and intelligently, meaning he understood what was going on." El-Shabazz acknowledged that his client wavered "back and forth," but voluntarily "submitted to" his recommendation.

Finally, El-Shabazz noted that, in every case involving such decisions, he emphasized to his client that: "Any decision is solely yours. I'll do whatever your marching orders are." *Id.* at 9-12, 18, 21, 26.

Braheem Lewis testified and confirmed that he and El-Shabazz had "debated" whether to waive a jury trial and that El-Shabazz thought a waiver trial was a better strategy. Braheem Lewis also claimed that, while El-Shabazz did review the jury waiver form with him, he still did not understand that he could have a jury trial if he so preferred. N.T. PCRA Hearing, 11/24/03, at 44, 53-54.

Attorney Sciolla testified that he explained the basics of a jury trial to his client, Hakim Lewis, and explained to the PCRA court why he preferred a bench trial for his client. In Sciolla's view, a non-jury trial was preferable because, in a joint trial, there was a greater risk that a jury would fail to render an individual verdict after hearing about the bad acts of his client's co-defendants. Sciolla stated that he would never intentionally overrule his client's decision to elect a jury trial. Sciolla also testified that he went over each question on the waiver form with his client before his client signed the form. Sciolla could not recall if his client balked privately at the prospect of proceeding non-jury. N.T. PCRA Hearing, 11/24/03, at 28, 30-32, 35.

Hakim Lewis testified that he told Attorney Sciolla that he preferred a jury trial and claimed that he neither read nor voluntarily signed the waiver form. He claimed that Sciolla told him the case had to be tried as a bench trial before Judge Means. *Id.* at 7, 9, 15-19. Attorney Fitzpatrick, the Lewises' appellate counsel, testified that he could no longer recall anything of substance concerning his representation of the Lewises on direct appeal, but that if they had indicated that their jury waivers were involuntary, he would have pursued the issue. N.T. PCRA Hearing, 12/4/03, at 33-34. Additionally, both Hakim Lewis and Braheem Lewis testified that they never informed Fitzpatrick of any difficulty or concern respecting their jury waivers. N.T. PCRA Hearing, 11/24/03, at 13, 47-48, 56.

On March 2, 2004, following oral argument, the PCRA court granted appellants' requests for relief on their claims of counsel ineffectiveness regarding the jury trial waiver. The court correspondingly declared appellants' remaining claims moot. N.T. PCRA Hearing, 3/2/2004, at 22.

The PCRA court later addressed its basis for granting relief in separate opinions. The opinions made clear that the key to the PCRA court's thinking was its belief that the absence of on-the-record oral waiver colloquies rendered the jury waivers invalid as a matter of law. Thus, in each opinion, the court began its discussion with this analysis:

"[a]fter reviewing the available record, this Court finds that the trial court erred in not conducting an on-the-record colloquy of Petitioner's waiver of a jury trial, and therefore Petitioner's waiver was not knowing and intelligent and was in violation of the Sixth Amendment." *Commonwealth v. Mallory*, PCRA Ct. Op. at 2; *Commonwealth v. Braheem Lewis*, PCRA Ct. Op. at 2; *Commonwealth v. Hakim Lewis*, PCRA Ct. Op. at 2. The PCRA court then discussed the particulars of each case. With regard to Mallory, the PCRA court noted that it accepted his testimony regarding his belief that he was required to agree to a waiver trial because his co-defendants had signed waiver forms. The PCRA court also accepted each appellant's testimony that he had insufficient time to comprehend the written waiver form and that each did not realize that the ultimate decision of whether to proceed with a bench or jury trial was his individual choice. The court also observed that Braheem Lewis's waiver form was not signed by the trial court.

Furthermore, the PCRA court rejected the Commonwealth's contention that the written waiver forms were sufficient without an oral colloquy. In the PCRA court's view, Pennsylvania case law requires a written jury waiver form to be supplemented with an oral colloquy. The PCRA court reasoned that appellants' faulty understanding of their jury trial rights could have been remedied with an oral colloquy and that an oral colloquy would have given them an opportunity to explain

that their written waivers were not voluntary. In sum, the PCRA court determined that appellants' ineffectiveness claims had merit because their counsel were ineffective in failing to object to the absence of on-the-record, oral waiver colloquies, which rendered appellants' waivers not knowing, voluntary, and intelligent as required by the Sixth Amendment. The court further found that appellants' trial lawyers lacked reasonable bases for failing to object to the absence of oral colloquies. With respect to the Lewises' direct appeal counsel, the court found that Attorney Fitzpatrick's failure to raise the issue of trial counsel's failure to object to the absence of oral colloquies lacked a reasonable basis. The PCRA court then concluded that counsel were ineffective, and therefore awarded a new trial to each appellant.

On the Commonwealth's appeal, the Superior Court reversed in a published opinion. *Commonwealth v. Mallory*, 888 A.2d 854 (Pa. 2005). The panel noted that appellants' jury waiver claims were embedded in prior counsel's alleged ineffective assistance and, therefore, the claims were subject to the traditional ineffectiveness test. The panel emphasized, *inter alia*, that to prevail on an ineffectiveness claim, the PCRA petitioner must show that he was prejudiced by counsel's action or inaction. The panel then noted that none of the witnesses at the PCRA hearing offered testimony regarding any prejudice suffered and that the PCRA court's opinion contained no analysis

regarding the prejudice suffered by appellants. The panel determined that, under the *Lassiter* OAJC, prejudice is established only where there is a reasonable probability that, but for counsel's ineffectiveness, the outcome of the trial would have been different. *Id.* at 859-60 (citing *Lassiter*, 722 A.2d at 662-63). In the panel's view, appellants pointed to nothing in the record to suggest that the trial court had improperly weighed evidence or that a jury would have viewed the evidence more sympathetically. The panel found, therefore, that appellants had failed to establish that the alleged ineffectiveness of their trial counsel resulted in prejudice. Moreover, the panel observed that there is no compelling Pennsylvania case law to suggest that a court may presume prejudice when a defendant alleges an ineffectiveness claim in the context of a violation of Criminal Rule 620. Accordingly, the panel vacated the PCRA court's new trial order and remanded for consideration of appellants' remaining claims.

We granted further review primarily to consider the proper approach to prejudice in the present ineffective assistance of counsel context, because the question was not definitively resolved by *Lassiter*.[11] That issue poses a question of law

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[11]In Lassiter, this author wrote the OAJC, which was joined by then-Mr. Justice Cappy and Madame Justice Newman. Mr. Justice Nigro concurred in the result without

(continued...)

and, accordingly, our scope of review is plenary and our standard of review is *de novo*. *Commonwealth v. Jones*, 912 A.2d 815, 816 n.1 (Pa. 2006).

In *Lassiter*, the appellant waived the right to a jury trial in exchange for the Commonwealth's promise not to seek the death penalty. Following a bench trial, the appellant was found guilty of second-degree murder, criminal conspiracy, robbery, and possession of an instrument of crime. A mandatory sentence of life imprisonment was imposed for murder. After the judgment of sentence was affirmed on direct appeal, the appellant sought collateral relief under the PCRA, which was denied by the PCRA court. The Superior Court affirmed and this Court granted further review. The question on appeal, as pertinent here, was whether Lassiter's trial counsel was ineffective for failing to advise her that the Commonwealth's promise not to seek the death penalty if she agreed to a waiver trial was illusory because there was a strong argument to be made that the case was not death-eligible. This was so, the appellant argued, because the only alleged aggravating circumstance -- that "[t]he defendant committed a killing while in the perpetration of a felony," 42 Pa.C.S. § 9711(d)(6) -- should be deemed inapplicable because

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[11](...continued)
opinion. Mr. Justice Saylor issued a dissenting opinion, which was joined by then-Chief Justice Flaherty and Mr. Justice Zappala.

she was an accomplice to the murder and not a principal. 722 A.2d at 658-59. (Implicit in the appellant's claim was that trial counsel's failure to realize that the Commonwealth's promise was illusory, and to so advise the appellant, compromised the voluntariness of her jury waiver.)

The Commonwealth in *Lassiter* disputed the appellant's interpretation of the scope of the (d)(6) aggravator, arguing that it encompassed accomplices along with principals, and also arguing, in the alternative, that counsel's alleged ineffectiveness in this regard was not prejudicial. The *Lassiter* OAJC analyzed the appellant's claim pursuant to the familiar performance and prejudice test for ineffectiveness derived from *Strickland v. Washington*, 466 U.S. 668 (1984) and *Commonwealth v. Pierce*, 527 A.2d 973 (Pa. 1987). The OAJC found that the appellant's argument that the statutory aggravator did not apply to accomplices had arguable merit and that trial counsel had no reasonable basis for failing to advise his client of the argument to be made that the Commonwealth's promise not to seek the death penalty was illusory. *Id.* at 661-62.

Addressing the prejudice prong of the *Strickland/Pierce* framework, the OAJC noted that the appellant was obliged to prove actual prejudice, which it described as a showing "by a reasonable probability that the outcome of her trial would have been different but for trial counsel's ineffective

assistance." *Lassiter*, 722 A.2d at 662. The OAJC concluded that the appellant had failed in this regard because she did not even attempt to establish (by affidavit from herself or counsel, or by request for a hearing) that she in fact would have selected a jury had she known that the death penalty was not likely to apply to her under Pennsylvania law. The OAJC noted that the Court could not presume the factual predicate that was essential to the appellant proving prejudice. *Id.* at 662-63.

The OAJC went on to opine, in *dicta*, that even if it was assumed that the appellant had proven that she would have chosen a jury but for counsel's ineffectiveness, she still failed to prove prejudice because she did not "establish by a reasonable likelihood that the outcome of her trial would have been different." *Id.* at 663. In this regard, the OAJC noted, the appellant pointed to nothing in the record to indicate that the bench trial judge had weighed the evidence improperly or incorrectly, or that a jury would have viewed her case more sympathetically. Finally, in a footnote responsive to the Dissenting Opinion, the *Lassiter* OAJC stated that prejudice could not be presumed, noting that the PCRA requires that the prejudice element of an ineffectiveness claim "be '**pleaded and prove[n]** by a preponderance of the evidence.'" *Id.* at 663 n.8 (quoting 42 Pa.C.S. § 9543(a) and adding emphasis).

In a brief Dissenting Opinion, Mr. Justice Saylor expressed his agreement with the OAJC's holding that a prosecution for murder based on accomplice liability would not support the (d)(6) aggravating circumstance, but disagreed with the OAJC's finding of no prejudice. In the Dissent's view, the express demonstration of prejudice required by the OAJC was "insurmountable" and left the deprivation of the appellant's constitutional right to a jury trial without a remedy. The Dissent viewed the alleged underlying constitutional deprivation as "presumptively prejudicial" and would have remanded for a new trial. *Id.* at 664 (Saylor, J., dissenting).

In the present case, appellants claim that the Superior Court erred in vacating the PCRA court's new trial order because the failure of trial counsel to request an of-record, oral jury waiver colloquy by the trial court involves a structural error that is not subject to the prejudice requirement of Strickland.[12] Appellants urge this Court to adopt the analysis in *McGurk v. Stenberg*, 163 F.3d 470 (8th Cir. 1998), and rule that if counsel's ineffectiveness causes a jury waiver that was neither knowing nor voluntary, the defendant does not have to establish that the outcome of the jury trial would have been more favorable than the bench trial that was conducted. Appellants assert that requiring proof of

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[12]Appellants have filed a single, joint brief.

such prejudice would create an insurmountable burden to the restoration of their constitutionally protected right to a trial by jury, which is a fundamental right deserving of heightened protection. Furthermore, appellants contend that *Lassiter* is distinguishable from the present case, as each testified and claimed that he would have exercised his right to a jury trial if only he had been orally colloquied and, in so doing, established the connection between counsel ineffectiveness and jury waiver which the *Lassiter* OAJC found to be lacking in its principal finding on prejudice.

The Commonwealth responds that, except in limited circumstances not implicated here, a defendant must prove actual prejudice in order to prevail on a claim of ineffective assistance of counsel. The Commonwealth further stresses that absent an actual or constructive denial of counsel, or an actual conflict of interest, the U.S. Supreme Court explicitly requires defendants to establish prejudice in order to prevail upon a claim of counsel ineffectiveness. The Commonwealth further observes that *McGurk* is not precedential in this jurisdiction and deems it wrongly decided under U.S. Supreme Court precedent, as it obliterates the distinction between direct review of preserved claims and collateral review of unpreserved claims. Because appellants did not prove, and the PCRA court did not find, *Strickland* prejudice, the Commonwealth submits that the Superior Court's decision should be affirmed.

In the alternative, the Commonwealth renews an argument it made in the Superior Court, but which that court did not reach, given its ruling on prejudice. The Commonwealth argues that appellants did not prove, and indeed the PCRA court did not find, that trial and direct appeal counsel knew, or should have known, that the written, explicit jury waivers executed by appellants were in fact involuntarily executed. With respect to the Lewises, the Commonwealth notes that Attorney Fitzpatrick had no reason to know that the explicit written waivers were not knowing and voluntary; the Lewises never told him that they were coerced or involuntary; and moreover, their signatures on the forms averring that the waivers were knowing and voluntary gave Fitzpatrick reason to believe that questioning the voluntariness of facially-valid waivers would be fruitless. The Commonwealth makes the same argument when addressing Mallory and Attorney Mischak, who served as both trial and appellate counsel.

Before turning to the question of the proper assessment of prejudice in this instance, it is helpful to examine the underlying rights which are at issue. The right to trial by jury is enshrined in both the U.S. and Pennsylvania Constitutions. *See* U.S. CONST. amend. VI; PA. CONST. art. I, § 6. The importance of the right is recognized by the procedural protections in Rule 620 of this Court's Criminal Procedural Rules, which provides that:

> In all cases, the defendant and the attorney for the Commonwealth may waive a jury trial with approval by a judge of the court in which the case is pending, and elect to have the judge try the case without a jury. The judge shall ascertain from the defendant whether this is a knowing and intelligent waiver, and such colloquy shall appear on the record. The waiver shall be in writing, made a part of the record, and signed by the defendant, the attorney for the Commonwealth, the judge, and the defendant's attorney as a witness.

Pa.R.Crim.P. 620.[13] As we have noted above, the PCRA court found that the absence of oral waiver colloquies in this case alone conclusively proved that appellants' waivers were invalid and that trial counsel's performance was constitutionally deficient. The analysis is not so simple.

The essential elements of a jury waiver, though important and necessary to an appreciation of the right, are nevertheless simple to state and easy to understand. "The[ ] essential ingredients,

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[13]This Rule was formerly numbered Pa.R.Crim.P. 1101.

basic to the concept of a jury trial, are the requirements that the jury be chosen from members of the community (a jury of one's peers), that the verdict be unanimous, and that the accused be allowed to participate in the selection of the jury panel." *Commonwealth v. Williams*, 312 A.2d 597, 600 (Pa. 1973); *accord Commonwealth v. Smith*, 450 A.2d 973, 974 (Pa. 1982). Notwithstanding the Rule's reference to a "colloquy on the record," the use of a written jury trial waiver form has been deemed sufficient in the absence of an oral jury trial waiver colloquy. *Williams*, 312 A.2d at 599-600 (rejecting request for *per se* prophylactic rule requiring relief whenever Rule 1101 (predecessor to Rule 620) is violated; if other evidence proves waiver was knowing and voluntary, purpose of Rule is served); *Smith*, 450 A.2d at 974 (written waiver form "must be accorded prima facie validity").

A waiver colloquy is a procedural device; it is not a constitutional end or a constitutional "right." Citizens can waive their fundamental rights in the absence of a colloquy; indeed, waivers can occur by conduct or by implication, as in the case of a criminal trial conducted *in absentia* after the defendant fails to appear. *See Commonwealth v. Wilson*, 712 A.2d 735, 737 (Pa. 1998). Moreover, the absence of an on-the-record colloquy concerning the fundamentals of a trial by jury does not prove, in an absolute sense, that a defendant failed to understand the right he waived by proceeding non-jury. Consider, for example, a criminally-accused lawyer

who waives a jury. Or, consider a career criminal defendant with previous, first-hand experience with jury trials. Or, imagine a reasonably intelligent client whose lawyer informed him, off the record, of the three basics of a jury trial. The record colloquy contemplated by Pa.R.Crim.P. 620 serves a salutary prophylactic purpose, as it makes it plain that a jury waiver is knowing and voluntary, and it creates a record in the event of a later, collateral attack upon the waiver. For the same twin reasons, an on-the-record colloquy is a useful procedural tool whenever the waiver of any significant right is at issue, constitutional or otherwise, *e.g.*, waiver of a trial, waiver of the right to counsel, waiver of the right to call witnesses, waiver of the right to cross-examine witnesses, waiver of rules-based speedy trial time limits, *etc.* But the colloquy does not share the same status as the right itself.

The right to a jury trial in criminal cases, unlike the Rule-based requirement of a waiver colloquy, does implicate constitutional concerns. If this case involved direct governmental denial of an explicit request for a jury -- if appellants had demanded a jury and the trial judge said, "No" -- appellants would have a valid claim that they were denied their constitutional right to trial by jury. But that is not the claim presented here. Appellants explicitly waived their rights to a jury, in writing, on the record. Appellants' shared collateral claim (the Lewises have an added burden concerning appellate counsel which we will address

below) is that, notwithstanding their explicit written waiver colloquies, which were attested by their lawyers, the prosecutor and (in two of three cases) the trial judge, those waivers were the product of the ineffectiveness of their trial counsel. Specifically, they allege that their lawyers failed to object when the trial court failed to conduct an on-the-record oral waiver colloquy to supplement the written waivers. If they had been so queried in open court, all three appellants claim, they would have contradicted their written waivers and demanded a jury. This not uncommon my-record-waiver-was-my-lawyer's-fault claim is far removed from the "constitutional, structural" error that would be at issue if a timely jury demand was wrongly denied. The current claim is also removed from a Rule 620 claim -- *i.e.*, a claim that the trial court erred in denying a request for an oral colloquy. No such request was made at trial by any of the appellants.

Recognizing that the claim here involves a collateral attack focusing upon the Sixth Amendment right to counsel, and that the collateral attack only indirectly implicates the distinct constitutional right to a jury trial and the Rule-based "right" to an oral waiver colloquy, is paramount to its proper evaluation. Of course, lawyers have an obligation to counsel their clients in conjunction with the waiver of basic rights, including the waiver of a jury; but the mere absence of a record oral waiver colloquy does not automatically prove

that a right was relinquished unknowingly or involuntarily and that the trial lawyer was ineffective for causing the waiver. When a presumptively-valid waiver is collaterally attacked under the guise of ineffectiveness of counsel, it must be analyzed like any other ineffectiveness claim. Such an inquiry is not resolved by the mere absence of an oral waiver colloquy; instead, the analysis must focus on the totality of relevant circumstances. Those circumstances include the defendant's knowledge of and experience with jury trials, his explicit written waiver (if any), and the content of relevant off-the-record discussions counsel had with his client. *See Commonwealth v. Allen*,732 A.2d 582, 590 (Pa. 1999) (rejecting *per se* approach and holding that trial court should determine defendant's actual knowledge in guilty plea colloquy context by looking at totality of circumstances to distinguish whether plea was voluntarily, knowingly, and intelligently made); *Commonwealth v. DeGeorge*, 485 A.2d 1089, 1091-92 (Pa. 1984) (permitting "consideration of circumstances outside the content of the of-record colloquy in determining the validity of the waiver" when counsel allegedly was ineffective for failing to object to trial court's acceptance of defendant's jury waiver without first conducting on-the-record colloquy); *see also Commonwealth v. O'Donnell*, 740 A.2d 198, 215-19 (Pa.

1999) (Castille, J., dissenting) (collecting and discussing cases).[14]

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[14]In *Williams, supra*, this Court rejected a claim that a trial court's failure to conduct an oral waiver colloquy should be subject to a "per se prophylactic rule" requiring reversal of the conviction. The *Williams* Court reasoned as follows:

> When we make rules for criminal proceedings we do so in order to protect the rights of the individual and therefore we expect strict compliance with those rules. However, a prophylactic exclusionary rule is applied only in extreme cases where all other attempts to secure compliance have proven unsuccessful. *See generally Mapp v. Ohio*, 367 U.S. 643, 651-652, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). In this area there has been no showing of widespread flagrant disregard to justify formulation of such a rule at this time.
>
> Furthermore, where there is a subsequent proceeding in which the waiver is proven to be knowing and intelligent on the record such a prophylactic rule seems unnecessary since the purposes of the rule to ensure the constitutionality of the waiver and our ability to review it, are satisfied. *See Commonwealth v. Godfrey*, 434 Pa. 532, 538, 254 A.2d 923 (1969) (Roberts, J., concurring).

Williams, 312 A.2d at 600 (construing Criminal Rule 1101, the predecessor of Rule 620).

The PCRA court's analysis of the underlying claim failed to appreciate this complexity, as it deemed the absence of an oral waiver colloquy alone to be conclusive proof that the jury waivers were both invalid and the product of counsel ineffectiveness.

A further complexity in this case is that the three appellants are not identically situated for purposes of collaterally attacking their waivers. The Lewises were represented by a new lawyer on appeal, while Mallory was represented by his trial counsel. The Lewises' appeals were litigated before this Court's decision in *Commonwealth v. Grant*, 813 A.2d 726 (Pa. 2002). *Grant* adopted a general rule in direct appeals requiring deferral of claims of ineffective assistance of counsel to PCRA review. *Id.* at 738. Pursuant to the prevailing law before *Grant*, however, the Lewises were obliged to raise record-based claims of trial counsel ineffectiveness on direct appeal, upon pain of waiver. The Lewises did not challenge their trial counsel's failure to object that their jury waivers were unknowing and involuntary, nor did they object to the absence of Rule 620 oral colloquies.

Accordingly, the Lewises' only prospect for relief on collateral attack is to successfully forward a layered ineffective assistance of counsel claim, *i.e.*, a claim that direct appeal counsel was ineffective for failing to claim that trial counsel were ineffective in failing to object to the absence of

an oral jury waiver colloquy, a failure which supposedly led to the entry of unknowing and involuntary jury waivers.[15]

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[15]In *Commonwealth v. McGill*, 832 A.2d 1014, 1023 (Pa. 2003), this Court instructed that review of layered claims of ineffectiveness must proceed in this manner:

> [A] petitioner must plead in his PCRA petition that his prior counsel, whose alleged ineffectiveness is at issue, was ineffective for failing to raise the claim that the counsel who preceded him was ineffective in taking or omitting some action. In addition, a petitioner must present argument . . . on the three prongs of the *Pierce* test as to each relevant layer of representation.

This Court has explained the practical consequences of *McGill* for the PCRA petitioner as follows:

> Therefore, in cases where appellate counsel is alleged to be ineffective for failing to raise a claim of trial counsel's ineffectiveness, *McGill* instructs that the inability of a petitioner to prove each prong of the *Pierce* test in respect to trial counsel's purported ineffectiveness alone will be fatal to his layered ineffectiveness claim. *McGill*, 832 A.2d at 1023; *see also Commonwealth v. Edmiston*, 578 Pa. 284, 851 A.2d 883, 891 (2004); *Commonwealth v. Rush*, 576 Pa. 3, 838 A.2d 651, 656 (2003). Proving trial counsel was ineffective, however, will establish the arguable merit prong of *Pierce* in respect to appellate counsel. *Rush*, 838 A.2d

(continued...)

We turn now to the issue accepted for review: whether appellants proved the prejudice necessary to sustain a claim of ineffective assistance in this scenario. Proper resolution of the issue requires this Court to first determine the proper measure of prejudice when the claim of ineffective assistance of counsel relates, not to the substance or fairness of the trial, but to the preliminary proceedings where the right to a jury was waived.

Appellants argue that prejudice should be presumed in cases where the right affected by counsel's conduct is the right to a jury trial, with a new trial as the automatic appropriate remedy. *Strickland*, of course, requires that a defendant plead and prove two components in order to gain relief: (1) that his "counsel's performance was deficient"; and (2) that the "deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687; *see also Pierce*, 527 A.2d at 975. A showing of *Strickland* "actual" prejudice requires the defendant to show that "there is a reasonable probability that, but for counsel's unprofessional errors, the

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[15](...continued)
at 656. The PCRA petitioner is then left to demonstrate that prior appellate counsel's actions lacked a reasonable basis and prejudiced him. *Id.*

Commonwealth v. Carson, 913 A.2d 220, 233 (Pa. 2006).

result of the proceeding would have been different." *Strickland*, 466 U.S. at 694.[16]

The presumed prejudice standard appellants advert to derives from *United States v. Cronic*, 466 U.S. 648(1984), decided the same day as *Strickland*. Pursuant to *Cronic*, prejudice may be presumed when there has been an actual or constructive denial of counsel, *i.e.*, when counsel's failure has been complete and it is as if the right to

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[16]In an effort to better focus the *Strickland* analysis, this Court has applied the performance part of the test by looking to both the arguable merit of the claim against counsel, as well as the objective reasonableness of the course taken, or not taken, by counsel. *Commonwealth v. Sneed*, 899 A.2d 1067, 1076 (Pa. 2006) (citing *Commonwealth v. Spotz*, 870 A.2d 822, 829-30 (Pa. 2005)).

> Thus, the constitutional ineffectiveness standard requires the defendant to rebut the presumption of professional competence by demonstrating that: (1) his underlying claim is of arguable merit; (2) the particular course of conduct pursued by counsel did not have some reasonable basis designed to effectuate his interests; and (3) but for counsel's ineffectiveness, there is a reasonable probability that the outcome of the proceedings would have been different. A failure to satisfy any prong of the test for ineffectiveness will require rejection of the claim.

Sneed, 899 A.2d at 1076 (citations omitted).

counsel has been denied. *See Florida v. Nixon*, 543 U.S. 175, 190 (2004); *Commonwealth v. Reaves*, 923 A.2d 1119, 1128 (Pa. 2007). In *Reaves*, this Court described the operation of *Cronic*'s presumption of prejudice:

> *Cronic* recognized that in some cases, the prejudice inquiry of *Strickland* is not required because there are certain circumstances "that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." 466 U.S. at 658, 104 S.Ct. at 2046. *Cronic* suggested that where there has been a complete denial of counsel or where the circumstances are such that any competent attorney would be unable to provide effective assistance, a defendant need not demonstrate that he was prejudiced by counsel's actions. *Id.* at 659-62, 104 S.Ct. at 2047-48. The presumed prejudice exception to *Strickland* has been found to apply where there was an actual or constructive denial of counsel, the state interfered with counsel's assistance, or counsel had an actual conflict of interest. *See* [*Smith v. Robbins*, 528 U.S. 246, 287, 120 S.Ct. 746, 765 (2000)].

Reaves, 923 A.2d at 1128. Furthermore, findings of actual or constructive denial of counsel have been limited to cases where "the acts or omissions of counsel were of the type that are virtually certain to undermine confidence that the defendant received a fair trial or that the outcome of the proceedings is reliable, primarily because they remove any pretension that the accused had counsel's reasonable assistance during the critical time frame." *Commonwealth v. Cousin*, 888 A.2d 710, 718 (Pa. 2005).

This Court has employed a *Cronic*-style presumption of prejudice where counsel's constitutional error has caused a total failure in the relevant proceeding. *See, e.g., Commonwealth v. Halley*, 870 A.2d 795, 801 (Pa. 2005) (prejudice presumed where counsel failed to file statement of matters complained of on appeal, which led to waiver of all claims); *Commonwealth v. Lantzy*, 736 A.2d 564, 572 (Pa. 1999) (prejudice presumed where counsel's failure to file requested direct appeal unjustified). Additionally, in *Florida v. Nixon*, *supra*, the U.S. Supreme Court recently reaffirmed the narrow limits of *Cronic*'s presumed prejudice exception. In *Nixon*, the High Court held that a showing of actual prejudice was required where the defendant claimed that counsel was ineffective for conceding guilt at the guilt phase of a capital trial. 543 U.S. at 189-91. The *Nixon* Court also described the infrequency of circumstances giving rise to the *Cronic* presumption, and

reiterated that *Cronic* is limited to situations where counsel's failure is complete, *i.e.*, where "counsel has entirely failed to function as the client's advocate." *Nixon*, 543 U.S. at 189-90.[17] *Accord Cousin*, 888 A.2d at 719 (*Cronic* presumption of prejudice not triggered when trial counsel concedes guilt of lesser crime in closing argument of bench trial).

Moreover, this Court has long required a demonstration of actual prejudice in circumstances involving jury waivers. Indeed, prior to *Strickland* and *Lassiter*, this Court held that counsel's advice to waive a jury trial can only be the basis for a successful claim of ineffective assistance of counsel when: "1) counsel interferes with his client's freedom to decide to waive a jury trial or 2) appellant can point to specific advice of counsel so unreasonable as to vitiate the knowing and intelligent waiver of the right." *Commonwealth v. Boyd*, 334 A.2d 610, 617 (Pa. 1975) (citation omitted).

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[17]The High Court has again reaffirmed the narrow contours of the *Cronic* presumption of prejudice in *Wright v. Van Patten*, No. 07-212 2008 WL 59980, at *3, ___ U.S. ___, ___, (Jan. 7, 2008) (*per curiam*) when holding that a state court reasonably applied established federal law when it held that counsel's participation at a plea hearing by speaker phone should not be treated as a complete denial of counsel, and therefore, does not trigger application of *Cronic*'s presumption of prejudice over the actual prejudice requirement of *Strickland*.

Also prior to *Strickland,* this Court addressed the central issue *sub judice* -- ineffective assistance of counsel, where there was a written jury waiver, and an allegedly inadequate oral colloquy -- in *Commonwealth v. Smith*, 450 A.2d 973. The Superior Court in *Smith* had granted a new trial, finding that counsel was ineffective in failing to object to the defective oral jury waiver colloquy. Justice Roberts, writing for a unanimous court, reversed on the allocatur pleadings. The *Smith* Court began by recognizing that the defendant's understanding of the essential elements of a jury trial was not reflected in the oral waiver colloquy that was conducted. Specifically, the colloquy addressed that the jury would be chosen from members of the community, but did not explore1the defendant's understanding that the jury's verdict had to be unanimous, or that he could participate in jury selection. Notwithstanding this defect, the Court emphasized that the trial court record revealed that the defendant had executed a written waiver of his right to a jury trial, that the waiver form addressed the points not addressed in the oral colloquy, and that the written waiver reflected the defendant's full awareness of the essentials of a jury trial. In reversing the grant of ineffectiveness relief, the Court stressed that the written waiver "must be accorded *prima facie* validity," and that the defendant had not challenged the validity of the written waiver. On that record, the Court concluded that the defendant "was aware of his rights, and that trial counsel was not ineffective for failing

to object to defects in the colloquy." 450 A.2d at 974.

To similar effect, in the pre-*Strickland* era was this Court's decision in *Commonwealth v. DeGeorge*, 485 A.2d 1089. In *DeGeorge* we examined whether counsel was ineffective where, as in the present case, the trial court accepted the defendant's signed, written jury waiver without conducting an on-the-record colloquy. 485 A.2d at 1090-91. The *DeGeorge* Court rejected the per se approach set forth in *Commonwealth v. Morin*, 383 A.2d 832, 835 (Pa. 1978), which required reversal and remand when counsel's ineffectiveness was responsible for the absence of a colloquy or an inadequate colloquy, and instead adopted a totality of the circumstances approach. 485 A.2d at 1091. The approach prescribed in *DeGeorge* went beyond the absence or inadequacy of the colloquy and looked to the circumstances surrounding thewaiver to see if the jury waiver was in fact knowing and voluntary. *Id.*

In light of these experiences, and the nature of waivers, the claim at issue falls squarely within the *Strickland* line, and not *Cronic*'s limited exception. The present circumstance -- where appellants, with the assistance of counsel, executed explicit signed, of-record written jury waivers -- is unlike the presumed prejudice scenarios found in *Lantzy* and *Halley*, where counsel's lapse caused the complete default of direct appeals requested by

the client. This situation, where valid written jury waivers were executed, does not represent the "complete failure" of counsel that would trigger the *Cronic* presumption. Therefore, contrary to the conclusion of the PCRA court, the absence of an oral jury waiver colloquy alone does not prove that counsel were ineffective. Rather, to prove trial counsel ineffective, each appellant must show that his understanding of the written waiver was constitutionally impaired by his lawyer's deficient performance, as well as proof that he would have elected a jury but for his lawyer's performance. Thus, we affirm the *Lassiter* OAJC to the extent it determined that, in circumstances like these, actual prejudice must be shown.

Concomitantly, we decline appellants' invitation to adopt the Eighth Circuit's reasoning in *McGurk v. Stenberg*, *supra*. In *McGurk*, the Eighth Circuit considered counsel's failure to realize that his client had a right to a jury trial in a prosecution for driving while under the influence of alcohol. The *McGurk* court equated counsel's failure to inform his client of that right to a denial of the right to trial by jury, and thus, a structural failure giving rise to a presumption of prejudice. In addition to the fact that *McGurk* is not binding upon this Court, it is distinguishable from the present case. Counsel in *McGurk* failed to inform his client of an important constitutional right. Here, appellants were not only informed of their right to a trial by jury, but executed detailed, explicit waivers

addressing that right. *McGurk* is inapposite here; actual prejudice must be shown.

What remains to be determined is the issue that formed the basis of the *Lassiter* OAJC's *dicta* concerning *Strickland* prejudice. Accepting that actual prejudice must be proven in an instance involving a claim of counsel ineffectiveness causing an invalid jury waiver, the focus turns to *Strickland*'s requirement that the defendant prove "prejudice" by demonstrating that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. The specific question is whether "the proceeding" in this instance means the jury waiver proceeding or the ultimate trial. The *Lassiter* OAJC posited that "the result of the proceeding" meant the ultimate outcome of the defendant's trial. In light of intervening precedent, this Court's further experience in this area, and the focused arguments we have been provided in this case, we now hold that, when a defendant claims that his jury waiver was not knowing and voluntary due to his counsel's ineffectiveness, to prove actual prejudice the defendant must demonstrate a reasonable probability that the result of the waiver proceeding would have been different absent counsel's ineffectiveness; he does not have to demonstrate that the outcome of a jury trial would have been more favorable than the bench trial.

At least in circumstances where waivers of fundamental rights are concerned, it appears that the "result of the proceeding" referred to in *Strickland* has been deemed to encompass the result of the trial stage where the alleged ineffectiveness took place, and not necessarily the ultimate verdict. The U.S. Supreme Court's decision in *Hill v. Lockhart*, 474 U.S. 52 (1985) is instructive. *Hill* involved a challenge to a guilty plea based on a claim of ineffective assistance of counsel. Applying the *Strickland* prejudice standard, the *Hill* Court concluded that the "defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Id.* at 59. The *Hill* Court compared the guilty plea context to ineffective assistance challenges to trial convictions:

> In many guilty plea cases, the "prejudice" inquiry will closely resemble the inquiry engaged in by courts reviewing ineffective-assistance challenges to convictions obtained through a trial. For example, where the alleged error of counsel is a failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence

> would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial. Similarly, where the alleged error of counsel is a failure to advise the defendant of a potential affirmative defense to the crime charged, the resolution of the "prejudice" inquiry will depend largely on whether the affirmative defense likely would have succeeded at trial.

474 U.S. at 59. Employing a totality of the circumstances approach, the *Hill* Court focused on the outcome of the guilty plea proceeding and did not require the defendant to demonstrate that but for counsel's error, he would not have pled guilty **and** would have achieved a better outcome at trial.

Since *Lassiter*, this Court, in various contexts, has focused on the result of the stage at trial where the alleged ineffectiveness took place. In *Commonwealth v. Flanagan*, 854 A.2d 489 (Pa. 2004) for example, the appellant claimed that his trial counsel was ineffective with respect to his entry of a guilty plea. Focusing on the result of the plea stage, this Court concluded that "[t]he standard for post-sentence withdrawal of guilty pleas dovetails with the arguable merit/prejudice requirements for relief based on a claim of

ineffective assistance of plea counsel under which the defendant must show that counsel's deficient stewardship resulted in a manifest injustice, for example, by facilitating entry of an unknowing, involuntary, or unintelligent plea." *Id.* at 502 (citation omitted). In *Commonwealth v. Allen*, 732 A.2d 582 (Pa. 1999), again focusing on the particular stage of trial where the alleged ineffectiveness took place, this Court reasoned that "[a]llegations of ineffectiveness in connection with the entry of a guilty plea will serve as a basis for relief only if the ineffectiveness caused appellant to enter an involuntary or unknowing plea." *Id.* at 587; *accord Commonwealth v. Spotz*, 896 A.2d 1191, 1226-27 (Pa. 2006) (where claim is that counsel was ineffective at penalty phase of capital trial, defendant must show that result of penalty phase hearing would have been different absent counsel's ineffectiveness).[18]

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[18]There are obviously some pre-trial proceedings where a claim of ineffectiveness would require an analysis on the effect at trial. For example, if a defendant could show that his counsel was ineffective in failing to secure suppression of evidence pre-trial, the remedy would not be a new suppression hearing. Instead, determining prejudice in such a case would require examination of the effect of the tainted evidence on the trial. *See Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986) ("Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is

(continued...)

Accordingly, we hold that when a defendant seeks to collaterally attack his waiver of a jury trial, on grounds that it was caused by the ineffective assistance of his trial counsel, to prove prejudice, he must demonstrate a reasonable probability that but for counsel's constitutionally deficient service, the outcome of the waiver proceeding would have been different, *i.e.*, that he would not have waived his right to a jury trial. In light of this conclusion, we necessarily hold that the Superior Court's approach to the *Strickland* prejudice inquiry in this case was erroneous.

What remains for decision is the proper mandate. In this respect, the analysis is not confined to *Strickland* prejudice for, as we have outlined earlier, the Commonwealth has forwarded an alternative argument challenging the PCRA court's evaluation of the *Strickland* performance inquiry. And, again as we have described above, it is apparent that the PCRA court's analysis of counsel's performance was erroneous in that the court proceeded under the mistaken assumption that the absence of the oral jury waiver colloquy alone was

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[18](...continued)
a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice"). Claims affecting waivers of fundamental rights, such as whether to go to trial, or whether to be tried by jury, however, are different in kind.

enough to prove both arguable merit and the absence of a reasonable basis respecting trial counsel. As we have explained above, the absence of an oral colloquy alone does not prove that a jury waiver was in fact unknowing or involuntary; rather, the PCRA court must look to the totality of the circumstances. This is especially the case when there was a detailed, written waiver signed, presented, and accepted in open court -- a waiver which, under *Smith*, should be accorded *prima facie* validity. Additionally in each case, both the prosecutor and defense counsel gave some measure of assurance to the trial court that the waivers were valid. These, too, are significant representations that must be accounted for.

We recognize that the PCRA court cited to other factors besides the absence of an oral waiver colloquy, including the discussions between the lawyers and their clients regarding the jury waiver. Nevertheless, the PCRA court's legal evaluation of the *Strickland* claims was influenced by an erroneous and controlling preliminary assumption that the absence of the oral waiver colloquies was decisive, and a concomitant failure to recognize the significance of the written waivers. The analysis regarding the underlying merits of appellants' ineffectiveness challenge must be more precise and must account for all relevant circumstances surrounding the waiver.

Moreover, the PCRA court's analysis must be more precise as to the Lewises, because their ineffectiveness claims are layered. To secure collateral relief, the Lewises must show that appellate counsel had, or should have had, reason to know that the jury waivers were invalid, notwithstanding the presence in the record of the written jury trial waivers, and that the defect in the waivers was attributable to trial counsel.

Given the deficiencies we have identified, the proper course in this case is to remand to the PCRA court for further proceedings. This course will allow the PCRA court to conduct an additional hearing, if such is deemed necessary, in order to examine the claims in light of our guidance in this Opinion. We offer no view on the ultimate merit of the claims, leaving that to the PCRA court in the first instance.

For the foregoing reasons, we vacate the order of the Superior Court and we remand this matter to the PCRA court for proceedings consistent with this Opinion. Jurisdiction is relinquished.

Former Chief Justice Cappy and former Justices Newman and Baldwin did not participate in the decision of this case.

Messrs. Justice Saylor, Eakin and Baer join the opinion.

**IN THE SUPREME COURT
OF PENNSYLVANIA
EASTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 66 EAL 2006
Respondent	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
RICKY MALLORY,	:	
Petitioner	:	
**********	:	**********
COMMONWEALTH OF PENNSYLVANIA,	:	No. 67 EAL 2006
Respondent	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
BRAHEEM LEWIS,	:	
Petitioner	:	
**********	:	**********

COMMONWEALTH OF PENNSYLVANIA,	:	No. 68 EAL 2006
Respondent	:	Petition for Allowance of Appeal from the Order of the Superior Court
v.	:	
HAKIM LEWIS,	:	
Petitioner	:	

ORDER

PER CURIAM

AND NOW, this 6th day of June, 2006, the Petitions for Allowance of Appeal are hereby **GRANTED and CONSOLIDATED**.

TRUE COPY FROM RECORD

Attest: JUN -6 2006

/s/
Patricia Johnson, Chief Clerk
Supreme Court of Pennsylvania,
Eastern District

COMMONWEALTH OF PENNSYLVANIA, Appellant v. RICKY MALLORY, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 869 EDA 2004
COMMONWEALTH OF PENNSYLVANIA, Appellant v. BRAHEEM LEWIS, Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 871 EDA 2004
COMMONWEALTH OF PENNSYLVANIA, Appellant v.	:	IN THE SUPERIOR COURT OF PENNSYLVANIA

HAKIM LEWIS, :
:
Appellee : No. 872 EDA 2004

ORDER

AND NOW, this 12th day of January, 2006, IT IS HEREBY ORDERED:

THAT the application filed November 23, 2005, requesting reargument/ reconsideration of the decision dated November 15, 2005, is DENIED.

PER CURIAM

J.S07022/05

2005 PA Super 385

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	IN THE SUPERIOR COURT OF PENN-SYLVANIA
vs.	:	
RICKY MALLORY, Appellee	:	No. 869 EDA 2004

Appeal from the Order entered March 2, 2004
In the Court of Common Pleas
of Philadelphia County
Criminal, No. CP #9802-0065 1/1

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	IN THE SUPERIOR COURT OF PENN-SYLVANIA
vs.	:	
BRAHEEM LEWIS, Appellee	:	No. 871 EDA 2004

Appeal from the Order entered March 2, 2004
In the Court of Common Pleas
of Philadelphia County
Criminal, No. CP #9709-1109 1/1

COMMONWEALTH OF PENNSYLVANIA, Appellant	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
vs.	:	
HAKIM LEWIS, Appellee	:	No. 872 EDA 2004

Appeal from the Order entered March 2, 2004
In the Court of Common Pleas
of Philadelphia County
Criminal, No. 9807-0777 1/1

BEFORE: BENDER, GANTMAN, AND JOHNSON,JJ.

OPINION BY GANTMAN, J.:
FILED NOVEMBER 15, 2005

¶ 1 Appellant, the Commonwealth of Pennsylvania, appeals from the order entered in the Philadelphia County Court of Common Pleas, which granted relief in the form of a new trial to Appellees, Ricky Mallory, Braheem Lewis and Hakim Lewis, on their claims brought under the Post Conviction Relief Act ("PCRA").[1] The Commonwealth asks us to determine whether the PCRA

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[1] 42 Pa.C.S.A. §§ 9541-9546.

court should have rejected Appellees' ineffective assistance of counsel claims because Appellees failed to demonstrate that there was a reasonable probability that the outcome of their trial would have been different but for the alleged ineffectiveness. We hold Appellees failed to establish that the alleged ineffective assistance of counsel resulted in prejudice. Accordingly, we vacate and remand for further proceedings.

¶ 2 The relevant facts and procedural history of these consolidated appeals are as follows. On August 27, 1996, multiple gunmen fired shots at the victim while he drove his car down 43rd Street in West Philadelphia. Police arrested Appellees in connection with the shooting and charged them with aggravated assault,[2] attempted murder,[3] violations of the Uniform Firearms Act ("VUFA"),[4] possessing instruments of crime ("PIC"),[5] simple assault,[6] recklessly endangering another person

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[2]18 Pa.C.S.A. § 2702.

[3]18 Pa.C.S.A. § 901.

[4]18 Pa.C.S.A. § 6108.

[5]18 Pa.C.S.A. § 907.

[6]18 Pa.C.S.A. § 2701.

("REAP")[7] and criminal conspiracy.[8] On September 15, 1998, Appellees appeared before the trial court with counsel.[9] Each Appellee entered a plea of not guilty, signed a jury trial waiver form, and filled out a written jury trial waiver colloquy. These documents informed each Appellee that if he was tried by a jury:

> (a) the jury would be chosen from members of the community thereby producing a jury of his peers;
>
> (b) any verdict rendered by a jury must be unanimous, that is, all twelve jurors must agree before they can return a verdict of guilty; and
>
> (c) he would be permitted to participate in the selection of the jury.

(Waiver of Jury Trial, dated 9/15/98, at 1). The court did not conduct an on-the-record oral colloquy. Instead, Appellees immediately proceeded to a joint bench trial on September 15th, following the

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[7] 18 Pa.C.S.A. § 2705.

[8] 18 Pa.C.S.A. § 903.

[9] Attorney Guy Sciolla represented Hakim Lewis. Attorney Tariq El-Shabazz represented Braheem Lewis. Attorney David Mischak represented Ricky Mallory.

court's acceptance of the written jury trial waiver documents.

¶ 3 On September 17, 1998, the court found Appellees guilty of aggravated assault, attempted murder, VUFA, PIC, simple assault, REAP and criminal conspiracy. On October 5, 1998, the court sentenced Appellees to consecutive terms of ten to twenty years' imprisonment for aggravated assault, twenty to forty years' imprisonment for attempted murder, two and one-half to five years' imprisonment for VUFA, two and one-half to five years' imprisonment for PIC and ten to twenty years' imprisonment for criminal conspiracy. Each Appellee filed a motion for reconsideration of sentence. On December 3, 1998, the court vacated Braheem Lewis' and Hakim Lewis' sentences for aggravated assault. On January 29, 1999, the court vacated Ricky Mallory's sentence for aggravated assault.

¶ 4 Braheem Lewis and Hakim Lewis filed a consolidated direct appeal with this Court on February 25, 1999.[10] Ricky Mallory filed his direct appeal with this Court on March 12, 1999.[11] On April 19, 2000, this Court affirmed the judgment of sentence for Braheem Lewis and Hakim Lewis.

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[10]Attorney F. Emmett Fitzpatrick represented Braheem Lewis and Hakim Lewis.

[11]Attorney Mischak continued to represent Ricky Mallory.

Commonwealth v. Lewis, 758 A.2d 722 (Pa.Super. 2000) (unpublished memorandum). This Court affirmed Ricky Mallory's judgment of sentence on July 3, 2000. ***Commonwealth v. Mallory***, 761 A.2d 1236 (Pa.Super. 2000) (unpublished memorandum). On September 5, 2000, our Supreme Court denied Braheem Lewis' petition for allowance of appeal. ***Commonwealth v. Lewis***, 563 Pa. 699, 761 A.2d 548 (2000). On December 12, 2000, our Supreme Court denied Rick Mallory's petition for allowance of appeal. ***Commonwealth v. Mallory***, 564 Pa. 728, 766 A.2d 1245 (2000). Our Supreme Court denied Hakim Lewis' petition for allowance of appeal on May 9, 2001. ***Commonwealth v. Lewis***, 566 Pa. 638, 781 A.2d 141 (2001).

¶ 5 On or about November 28, 2001, Braheem Lewis and Hakim Lewis filed their first, counseled PCRA petition. On December 11, 2001, Ricky Mallory filed his first *pro se* PCRA petition. The court appointed PCRA counsel for Ricky Mallory on January 23, 2002. On August 29, 2002, Braheem Lewis and Hakim Lewis filed an amendment to their first PCRA petition. Counsel filed Ricky Mallory's amended PCRA petition on September 30, 2002. Each Appellee claimed ineffective assistance of prior counsel for, *inter alia*, failing to challenge the knowing, voluntary, and intelligent nature of Appellees' jury trial waivers. On November 24, 2003 and December 4, 2003, the PCRA

court conducted evidentiary hearings on Appellees' petitions.

¶ 6 On March 2, 2004, the trial court held oral argument on the issue of counsel's ineffectiveness for not objecting to the trial court's failure to conduct on-the-record, oral jury trial waiver colloquies for Appellees. Braheem Lewis and Hakim Lewis also argued that their appellate counsel provided ineffective assistance for failing to raise the issue of the defective colloquy on direct appeal. Following argument, the PCRA court entered an order which granted a new trial to Appellees, on the basis that Appellees' waiver of their right to a jury trial was not knowing, intelligent and voluntary. To the extent that Appellees' amended PCRA petitions sought other relief, the PCRA court stated Appellees' additional claims were now moot. (N.T. Hearing, 3/2/04, at 22). The Commonwealth timely filed this appeal.

¶ 7 The Commonwealth raises the following two issues for our review:

> SHOULD [APPELLEES'] CLAIMS THAT INEFFECTIVE ASSISTANCE OF COUNSEL CAUSED THEM TO INVOLUNTARILY WAIVE THEIR RIGHTS TO A JURY HAVE BEEN REJECTED BECAUSE THEY DID NOT DEMONSTRATE–AND THE PCRA COURT DID NOT

> FIND–ACTUAL PREJUDICE, *I.E.*, A REASONABLE PROBABILITY THAT THE VERDICT WOULD HAVE BEEN DIFFERENT BUT FOR THE ALLEGED INEFFECTIVENESS?
>
> IF THE ABOVE QUESTION IS ANSWERED "NO," THE FOLLOWING QUESTION IS PRESENTED: SHOULD [APPELLEES] INEFFECTIVENESS CLAIMS HAVE BEEN REJECTED BECAUSE [APPELLEES] DID NOT PROVE–AND THE PCRA COURT DID NOT FIND–THAT DIRECT APPEAL COUNSEL KNEW, OR SHOULD HAVE KNOWN, THAT THE WRITTEN JURY WAIVERS WERE SUPPOSEDLY SIGNED INVOLUNTARILY?

(Commonwealth's Brief at 2).

¶ 8 "When reviewing an order [granting or] denying PCRA relief, we must determine whether the PCRA court's determination is supported by the record and is free from legal error." ***Commonwealth v. Poplawski***, 852 A.2d 323, 327 (Pa.Super. 2004) (quoting ***Commonwealth v. Geathers***, 847 A.2d 730, 733 (Pa.Super. 2004)). "This Court grants great deference to the findings of the PCRA court if the record contains any

support for those findings." ***Commonwealth v. Carr***, 768 A.2d 1164, 1166 (Pa.Super. 2001).

¶ 9 In its first issue, the Commonwealth asserts, "to prevail on a claim that ineffective assistance of counsel caused an involuntary jury waiver, a defendant must prove actual prejudice, which entails a showing that the verdict likely would have been different but for the jury waiver." (Commonwealth's Brief at 10). The Commonwealth contends Appellees did not prove actual prejudice in this case, and the PCRA court did not find prejudice. The Commonwealth concludes Appellees did not meet their burden to prove that counsel's ineffective assistance resulted in prejudice, and the PCRA court erred in granting relief to Appellees.

¶ 10 In response, Appellees rely on ***McGurk v. Stenberg***, 163 F.3d 470 (8th Cir. 1998), to support their argument that the trial court's failure to conduct a proper oral colloquy constituted a "structural defect" under both the United States and Pennsylvania Constitutions, which creates a presumption of prejudice. (Brief for Braheem Lewis and Hakim Lewis at 10). Further, Appellees claim they would have asserted their right to a jury trial if the trial court had conducted an on-the-record oral colloquy. Appellees conclude the PCRA court correctly determined that they were denied their fundamental right to a jury trial and properly granted a new trial. We disagree.

¶ 11 The following principles apply to ineffective assistance of counsel claims:

> To succeed on a claim that counsel was ineffective, Appellant must demonstrate that: (1) the claim is of arguable merit; (2) counsel had no reasonable strategic basis for his or her action or inaction; and (3) but for the errors and omissions of counsel, there is a reasonable probability that the outcome of the proceedings would have been different. We presume counsel is effective and place upon [the petitioner] the burden of proving otherwise. Counsel cannot be found ineffective for failing to pursue a baseless or meritless claim.

Poplawski, supra (quoting ***Geathers, supra***) (internal citations omitted). The failure to satisfy any prong of the test for ineffectiveness will cause the claim to fail. ***Commonwealth v. Rush***, 576 Pa. 3, 838 A.2d 651 (2003).

¶ 12 "Prejudice is established when [a defendant] demonstrates that counsel's chosen course of action had an adverse effect on the outcome of the proceedings." ***Commonwealth v. Chambers***, 570 Pa. 3, 21, 807 A.2d 872, 883 (2002) (quoting ***Commonwealth v. Balodis***, 560 Pa. 567, 572, 747 A.2d 341,

343-44 (2000)). "Prejudice in the context of ineffective assistance of counsel means demonstrating that there is a reasonable probability that, but for counsel's error, the outcome of the proceeding would have been different." ***Commonwealth v. Cox***, 581 Pa. 107, 125, 863 A.2d 536, 546 (2004). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Chambers***, ***supra*** at 22, 807 A.2d at 883 (quoting ***Strickland v. Washington***, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674, 698 (1984)).

¶ 13 Pennsylvania Rule of Criminal Procedure 620 governs a defendant's waiver of his right to a jury trial as follows:

> **Rule 620. Waiver of Jury Trial**
>
> In all cases, the defendant and the attorney for the Commonwealth may waive a jury trial with approval by a judge of the court in which the case is pending, and elect to have the judge try the case without a jury. The judge shall ascertain from the defendant whether this is a knowing and intelligent waiver, and such colloquy shall appear on the record. The waiver shall be in writing, made a part of the record, and signed by the defendant, the attorney for the Commonwealth,

> the judge, and the defendant's attorney as a witness.

Pa.R.Crim.P. 620.

> [A] voluntary waiver of a trial by jury will be found to be knowing and intelligent when the on-record colloquy indicates that the defendant knew the essential ingredients of a jury trial which are necessary to understand the significance of the right being waived. These essential ingredients are the requirements that the jury be chosen from members of the community (a jury of one's peers), that the verdict be unanimous, and that the accused be allowed to participate in the selection of the jury panel.

Commonwealth v. O'Donnell, 559 Pa. 320, 337, 740 A.2d 198, 207-08 (1999).

¶ 14 Our Supreme Court addressed an analogous claim of ineffective assistance of counsel in the context of a waiver of the right to trial by jury in ***Commonwealth v. Lassiter***, 554 Pa. 586, 722 A.2d 657 (1998).[12] In ***Lassiter***, the appellant

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[12]We note: It is well-settled that plurality opinions do (continued...)

argued trial counsel had provided ineffective assistance because counsel failed to advise her that the Commonwealth's promise not to pursue the death penalty if the appellant agreed to a bench trial constituted illusory consideration; the death penalty would not have applied had the matter gone before a jury. The Supreme Court determined the appellant's claim was of arguable merit. Further, the Court stated there was no reasonable basis for counsel's failure to explain to the appellant that a "strong argument" could be made that the death penalty could not apply. ***Id.*** at 596, 722 A.2d at 662. The Supreme Court, however, did not grant relief, because the appellant failed to satisfy the prejudice prong of the test for ineffectiveness:

> Here, appellant plainly has not met her burden to show by a reasonable probability that the outcome of her trial would have been different but for trial counsel's ineffective assistance. At the outset, we note that appellant has not even attempted to establish that she would indeed have selected a

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[12](...continued)
not have precedential authority." ***Commonwealth*** *v.* ***Minor***, 647 A.2d 229, 231 n. 3 (Pa.Super. 1994), *appeal denied*, 544 Pa. 604, 674 A.2d 1069 (1996). In ***Lassiter***, a plurality opinion, Justice Castille wrote the opinion announcing the judgment of the Court. Justice Nigro concurred in the result.

jury trial had she known that the death penalty likely would not apply to her under Pennsylvania law. Criminal defendants waive their right to a jury trial for many reasons, including the perception of leniency on the part of the trial judge. Appellant failed to either request a hearing in the PCRA court or present affidavits from herself or from trial counsel in an effort to establish that she would have pursued a jury trial but for trial counsel's ineffective assistance in failing to advise her of the possible inapplicability of the death penalty. In the absence of testimony by appellant or trial counsel, this Court cannot presume that appellant would have chosen a jury trial over a non-jury trial. To hold otherwise would be to ignore the fact that the burden of proof is on appellant to set forth a **factual predicate** identifying how her interests would have been better served by trial counsel's taking a different course of action.

* * *

Moreover, even if appellant did provide relevant testimony that she would have selected a jury trial but for trial counsel's ineffective assistance, she still would fail to establish by a

reasonable likelihood that the outcome of her trial would have been different. Appellant points to nothing in the record which would indicate that the trial judge weighed the evidence improperly or incorrectly, or that a jury would have viewed her case more sympathetically. Thus, given the relevant legal standards, appellant has failed to meet her burden of proof to establish that trial counsel's ineffective assistance prejudiced her.[8]

> FN8. The dissent takes the view that the deprivation of appellant's fundamental constitutional right to a trial by jury is "presumptively prejudicial." The dissent mischaracterizes the right at issue. Appellant does not assert that she was denied her constitutional right to a trial by jury, but rather that she was denied her constitutional right to the effective assistance of counsel which in turn resulted in her improper waiver of her right to a jury trial. Since this is an ineffectiveness claim, the dissent[']s imposition of "presumptive prejudice" flies directly in the face of

> the PCRA, which requires that the prejudice prong of an ineffectiveness claim be "**plead and prove[n]** by a preponderance of the evidence." 42 Pa.C.S. § 9543(a) (emphasis added). For the reasons stated above, appellant falls woefully short of proving prejudice.

Id. at 597-98, 722 A.2d at 662-63 (internal citations and some footnotes omitted) (emphasis in original).

¶ 15 Instantly, Appellees appeared before the trial court and pled not guilty on September 15, 1998. Following the submission of the jury trial waiver forms, the court did not conduct an oral colloquy for any of Appellees. Appellees proceeded to their bench trial, and the court reached its guilty verdict on September 17, 1998. After exhausting their direct appeal rights, Appellees sought relief under the PCRA. Each Appellee filed an amended, counseled PCRA petition which claimed prior counsel's ineffectiveness for, *inter alia*, failing to object when the trial court did not conduct an oral waiver colloquy. Appellees argued that their jury trial waivers were therefore not knowing, voluntary and intelligent, due to this defect in the colloquy process.

¶ 16 The PCRA court conducted two evidentiary hearings on this matter. On November 24, 2003, Ricky Mallory and Attorney Mischak appeared

before the PCRA court. Ricky Mallory testified he "thought" he had to sign the written colloquy and waiver forms because his co-defendants had already signed their forms. (N.T. Hearing, 11/24/05, at 9). Ricky Mallory also claimed: "At the moment that I signed my waiver, I knew that it was not what I wanted to do." (***Id.*** at 21). Attorney Mischak testified that he and Ricky Mallory had discussed proceeding to a jury trial, and Attorney Sciolla first suggested the option of a bench trial. (***Id.*** at 25-26). Importantly, these witnesses did not offer any testimony regarding how Appellees' claims satisfied the prejudice prong of the test for ineffective assistance of counsel.

¶ 17 Attorney El-Shabazz and Attorney Fitzpatrick testified on December 4, 2003.[13] Attorney El-Shabazz did not recall whether the trial court orally inquired about the voluntariness of Braheem Lewis' waiver. (N.T. Hearing, 12/4/03, at 5). After Braheem Lewis decided to proceed to a bench trial, Attorney Shabazz explained the waiver form to Lewis. (***Id.*** at 18). Like Ricky Mallory and Attorney Mischak, Attorney El-Shabazz and Attorney

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[13]The transcripts of the PCRA court's evidentiary hearing, which are contained in the certified and reproduced records, do not include testimony from Braheem Lewis and Hakim Lewis.

Fitzpatrick did not offer testimony regarding any prejudice suffered by Appellees.[14]

¶ 18 By order entered March 2, 2004, the PCRA granted Appellees a new trial. Regarding Ricky Mallory's ineffective assistance of counsel claim, the PCRA court set forth its analysis in its opinion pursuant to Pennsylvania Rule of Criminal Procedure 1925(a):

> In this case, [Appellee] alleged that he wished to have his case proceed in front of a jury, although he eventually yielded to trial counsel's insistence on a bench trial.
>
> * * *
>
> The fact that no [oral] colloquy took place on the record resulted in [Appellee's] waiver being unknowing and unintelligent. Trial counsel's failure to object to the absence of the colloquy at trial is an issue of merit, and the failure to raise it was not the result of a strategy reasonably designed to advance [Appellee's] interests. Therefore, trial counsel provided ineffective assistance to [Appellee].

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[14]Attorney Fitzpatrick could not recall whether his clients informed him about the circumstances surrounding their jury trial waiver, and did not recall whether he reviewed the trial transcripts for their case. (*Id.* at 32).

(PCRA Court Opinion, dated June 29, 2004, at 5-6) (footnotes omitted). The court provided similar reasoning for the issues raised by Braheem Lewis and Hakim Lewis:

> The fact that no colloquy took place on the record resulted in [Appellees'] waiver being unknowing and unintelligent. This is an issue of merit, and the failure to raise it was not the result of a strategy reasonably designed to advance [Appellees'] interests. Therefore, appellate counsel erred in not bringing this issue out on direct appeal, and provided ineffective assistance to [Appellees].

(PCRA Court Opinion, dated June 29, 2004, at 6).[15]

¶ 19 Appellees acknowledge counsels' failure to object prior to trial when the court did not conduct an oral jury waiver colloquy. Likewise, Braheem Lewis and Hakim Lewis assert appellate counsel erred by not raising this issue on direct appeal. Appellees, however, raise their jury waiver claims under the rubric of ineffective assistance of counsel. Appellees' claims are therefore rooted in counsel's

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[15]The PCRA Court wrote separate Rule 1925(a) opinions for Braheem Lewis and Hakim Lewis. However, the court used the same ineffective assistance analysis in both opinions.

ineffective assistance and we must utilize the three-prong test for ineffectiveness to conduct our review. ***See Poplawski, supra. Compare Commonwealth v. Foreman***, 797 A.2d 1005, 1015 (Pa.Super. 2002) (stating totality of circumstances analysis should be used when Court reviews validity of jury trial waiver on direct appeal).

¶ 20 Significantly, the PCRA court failed to address the prejudice requirement of the three-prong test. To aid in our assessment of prejudice in the instant case, we believe our Supreme Court's analysis in ***Lassiter*** is instructive because it suggests how the Court applies the test for ineffective assistance of counsel in the context of a challenge to a jury trial waiver as a PCRA claim. In ***Lassiter***, the Supreme Court analyzed each prong of the test for ineffectiveness. Although the appellant's claim had arguable merit and counsel had no reasonable basis for his inaction, the Court determined the appellant failed "to establish by a reasonable likelihood that the outcome of her trial would have been different." ***See Lassiter, supra*** at 598, 722 A.2d at 663.

¶ 21 Similar to the appellant in ***Lassiter***, Appellees have failed to establish by a reasonable probability that the outcome of their trial would have been different. ***See Cox, supra; Chambers, supra.*** At the evidentiary hearings conducted by the PCRA court, Appellees vigorously argued that

their waivers had been induced due to the coercion of defense counsel. However, Appellees pointed to nothing in the record which would indicate that the trial court weighed the trial evidence improperly or incorrectly, or that a jury would have viewed the case more sympathetically. ***See id.*** Thus, given the relevant legal standards, Appellees failed to establish that the alleged ineffective assistance of counsel resulted in prejudice. ***See id. See also Lassiter, supra.***

¶ 22 Appellees also fail to cite any controlling Pennsylvania precedent for the proposition that the failure to conduct an oral colloquy justifies a presumption of prejudice. While Appellees heavily rely on the decision of the Eighth Circuit Court of Appeals in ***McGurk***, we decline to extend the Eighth Circuit's holding to the instant case. Instead, our Supreme Court's decision in ***Lassiter*** persuades us that under Pennsylvania law, there is no "presumptive prejudice" when a defendant raises an ineffective assistance of counsel claim in the context of a violation of Rule 620. ***See Lassiter, supra*** at 598 n.8, 722 A.2d at 663 n.8.

¶ 23 Based upon the foregoing, we hold Appellees failed to establish that the alleged ineffective

assistance of counsel resulted in prejudice.[16] Thus, we vacate and remand the matter to the PCRA court to consider the remaining claims in Appellees' PCRA petitions.[17]

¶ 24 Order vacated; case remanded with instructions. Jurisdiction is relinquished.

Judgment Entered.

/s/ David A. Szewczak
Prothonotary

Date: NOV 15 2005

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[16]Due to our disposition, we do not address the Commonwealth's remaining claim.

[17]The March 2, 2004 order of the PCRA court granted a new trial to Appellees on the grounds that Appellees' waiver of their right to a jury trial was unknowing and unintelligent. To the extent that Appellees' amended PCRA petitions raised additional issues, the PCRA court stated Appellees' remaining claims were moot, because the court granted a new trial. Accordingly, we remand for the consideration of these additional claims.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH	:	FEBRUARY
	:	TERM, 1998
	:	NO. 0065
vs.	:	
	:	SUPERIOR
	:	COURT NO.
RICKY MALLORY	:	869 EDA. 2004

OPINION

KEOGH, J. JUNE 29, 2004

The Commonwealth has filed an appeal from this Court's order pursuant to the Post Conviction Relief Act, 42 Pa. C.S.A. § 9541 *et seq.*, granting the Petitioner post-conviction relief in the form of a new trial.

I. HISTORY

1. On September 17, 1998, following a bench trial before the Honorable Rayford A. Means, the Petitioner was found guilty of Attempted Murder, Aggravated Assault, Possession of an Instrument of Crime, Violation of the Uniform Firearms Act, Criminal Conspiracy, and Recklessly Endangering

Another Person. David Mischak, Esquire represented the Petitioner at trial.

2. The Commonwealth presented evidence establishing that on August 26, 1997 at 10:00 a.m. Dante Hunter was shot while driving his car down 43rd Street in West Philadelphia. Mr. Hunter testified that Petitioner and his co-defendants, Hakim Lewis and Braheem Lewis, were the individuals that shot at his car. Both the victim and the defendants were alleged to be associates in a large, ongoing drug trafficking scheme.

3. On October 5, 1998, post-verdict motions were denied and Judge Means sentenced Petitioner to an aggregate sentence of forty-five (45) to ninety (90) years. On January 29, 1999, this sentence was reduced to thirty-five (35) to seventy (70) years[1] and Petitioner's Motion for Reconsideration based on After Discovered Evidence was heard and denied. On February 16, 1999 post sentencing motions were denied. On March 12, 1999 Petitioner filed an appeal to the Pennsylvania Superior Court, which affirmed his judgment of sentence on July 3, 2000. On December 12, 2000, Petitioner's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was denied.

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[1]Petitioner had initially been sentenced to ten (10) to twenty (20) years on the Aggravated Assault charge, however, this was later vacated.

4. On December 11, 2001, Petitioner filed a *pro se* petition for relief under the Post Conviction Relief Act. Salvatore Adamo, Esquire, was appointed as counsel in the matter, and filed an amended petition on September 30, 2002 alleging, among other things, that Petitioner did not voluntarily and knowingly waive his constitutional right to a jury trial. Counsel was later permitted to withdraw, and Patrick Egan, Esquire was retained. He submitted a new amended petition on April 23, 2003. Testimony was heard on November 25 and December 4, 2003, and on March 2, 2004 this Court granted Petitioner's request for relief in the form of a new trial. The Commonwealth now appeals.

II. DISCUSSION

After reviewing the available record, this Court finds that the trial court erred in not conducting an on-the-record colloquy of Petitioner's waiver of a jury trial, and therefore Petitioner's waiver was not knowing and intelligent and was in violation of the Sixth Amendment. Therefore, the PCRA Court properly granted Petitioner's request for relief in the form of a new trial.

A. *Standard of Review on Appeal*

Review by an appellate court of the trial court's disposition of a post conviction petition is "limited to determining whether the court's findings were supported by the record and the court's

order is otherwise free of legal error. The findings of the post conviction court will not be disturbed unless they have no support in the record." *Commonwealth v. McCord*, 644 A.2d 1206, 1209 (Pa. Super. 1994), app. denied, 673 A.2d 332 (Pa. 1996) (quoting *Commonwealth v. Granberry*, 644 A.2d 204, 207 (Pa. Super. 1994)).

B. *Failure of Trial Judge to Conduct On-the-Record Colloquy of Waiver of Jury Trial*

Pennsylvania's Rules of Criminal Procedure provide that in all cases, a defendant may waive a jury trial with approval by a judge of the court in which the case is pending, and elect to be tried by a judge without a jury.[2] The judge shall ascertain from the defendant whether the defendant's waiver is voluntary. The waiver shall be in writing, made a part of the record, signed by the defendant, the judge, and the defendant's attorney, as a witness. *Commonwealth v. Johnson*, 771 A.2d 751, 757 (Pa. 2001).

The Pennsylvania Supreme Court has held that a voluntary waiver of a trial by jury is knowing and intelligent when the on-the-record colloquy indicates that the defendant knew the essential ingredients of a jury trial that are necessary to

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[2]Pa.R.Crim.P. 620 (West, 2004).

understand the significance of the right being waived. *Johnson*, 771 A.2d at 757. The essential ingredients are the requirements that the jury be chosen from members of the community, that the verdict be unanimous, and that the accused be allowed to participate in the selection of the jury panel. *Id.*

In this case, the trial judge did not conduct an on-the-record colloquy with the defendant. Rather, the judge addressed defense counsel for Petitioner directly as to the defendant's waiver of the jury trial. The first time Judge Means addressed counsel was to ask if the case was proceeding as a waiver trial.[3] This inquiry was answered in the affirmative by the Assistant District Attorney (hereinafter "ADA").[4] The Judge then asked if the waiver colloquies were done and signed by the ADA, to which the ADA responded "yes."[5] A short time later, after counsel for one of Petitioner's co-defendants volunteered that his waiver of colloquy form was signed, Judge Means responded by stating "I have signed the colloquy on Hakim Lewis, Braheem Lewis, and Ricky

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[3]NT. 9/15/98 at 5.

[4]*Id.*

[5]*Id.*

Mallory."[6] This concluded all on-the-record discussion of the defendant's jury waiver, in a case that had been listed for months for a five (5) day jury trial.

By proceeding in this fashion, the defendant was unable to express to the court that he had not truly wanted to waive his right to a jury trial. Petitioner testified that he only waived his right to a jury trial because he believed that he had no other choice.[7] Had Judge Means conducted an on-the-record colloquy, Petitioner would have had an opportunity to state to the Court that he was not willing to waive his right to a jury trial. The Court, being aware of Petitioner's faulty belief could have taken the necessary steps to remedy the situation immediately. The fact that Petitioner was operating under an erroneous assumption that could have been uncovered and remedied by the trial court, in addition to Petitioner's testimony that he did not wish to proceed with a waiver trial, shows that his waiver was not voluntary.

The Commonwealth advances the argument that an on-the-record colloquy was unnecessary because Petitioner read and signed the written jury waiver form. However, as the relevant case law

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[6] *Id.* at 8.

[7] N.T. 11/24/03 (P.C.R.A.), at 9-10.

clearly dictates, an on-the-record colloquy must supplement the written waiver.[8] Furthermore, as Petitioner testified at his P.C.R.A. hearing, he was given a minute and a half with what the Commonwealth has referred to as an "extensive six-page, 42 item written jury trial waiver colloquy"[9] before he had to sign it.[10] Petitioner testified that he did not read the waiver form,[11] and in this Court's estimation, a minute and a half is clearly an insufficient period of time for Petitioner to have fully read and understood the complex waiver document prior to signing away his Sixth Amendment right to a jury trial.

C. *Ineffectiveness of Appellate Counsel*

Beginning with the assumption that trial counsel was effective,[12] a Petitioner's claims of ineffective assistance of counsel under the P.C.R.A.

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[8]*See* Pa.R.Crim.P. 620; *Commonwealth v. Johnson*, 771 A.2d 751, 758 (Pa. 2001).

[9]Commonwealth Motion to Dismiss, 6/4/03, at 13.

[10]N.T. 11/24/03 (P.C.R.A.), at 10.

[11]*Id.* It is also of note that Petitioner only advanced to the tenth grade in school, as is also noted on the waiver itself.

[12]*Commonwealth v. Breakiron*, 729 A.2d 1088 (Pa. 1999).

must be evaluated using the three-prong test from *Commonwealth v. Pierce*.[13] If the Petitioner can not show how the results of his trial would have been different had counsel not erred, his Petition must fail.

In this case, Petitioner alleged that he wished to have his case proceed in front of a jury, although he eventually yielded to trial counsel's insistence on a bench trial.[14] However, the proper safeguards were not in place to ensure that his waiver was knowing and intelligent. Petitioner was represented by trial counsel on his direct appeal, and thus, the P.C.R.A. stage was the first appropriate stage at which to raise an

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[13]In order to prove that ineffective assistance of counsel resulted in an unjust conviction or sentence pursuant to 42 Pa. C.S.A. § 9543(a)(2)(ii), a Petitioner must set forth the following:

i. The underlying claim has arguable merit;
ii. Counsel's act or omission was not reasonably designed to advance the defendant's interests;
iii. There is a reasonable probability that but for the errors of counsel the result would have been different.

Commonwealth v. Pierce, 645 A.2d 189 (Pa. 1994).

[14]N.T. 11/24/03 (P.C.R.A.), at 16-17.

ineffectiveness claim.[15] The fact that no colloquy took place on the record resulted in Petitioner's waiver being unknowing and unintelligent. Trial counsel's failure to object to the absence of the colloquy at trial is an issue of merit, and the failure to raise it was not the result of a strategy reasonably designed to advance Petitioner's interests. Therefore, trial counsel provided ineffective assistance to Petitioner.

III. CONCLUSION

For the reasons set forth above, post-conviction relief was properly granted.

BY THE COURT:

/s/
D. Webster Keogh, J.

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[15]Petitioner's direct appeal to the Superior Court was decided on July 3, 2000, a year and a half before *Commonwealth v. Grant* (813 A.2d 726 (Pa. 2002)) was decided. Therefore, according to the applicable law at the time, *Commonwealth v. Hubbard*, 372 A.2d 687,695 (Pa. 1977), overruled in part by *Grant*, 813 A.2d at 738, "ineffectiveness of prior counsel must be raised as an issue at the earliest stage in the proceedings at which the counsel whose effectiveness is being challenged no longer represents the defendant." *Hubbard*, 372 A.2d 687, 695 n.6.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH	:	**SEPTEMBER**
	:	**TERM, 1997**
	:	**NO. 1109**
vs.	:	
	:	**SUPERIOR**
	:	**COURT NO.**
BRAHEEM LEWIS	:	**871 EDA. 2004**

O P I N I O N

KEOGH, J. **JUNE 29, 2004**

The Commonwealth has filed an appeal from this Court's order pursuant to the Post Conviction Relief Act, 42 Pa. C.S.A. § 9541 *et seq.*, granting the Petitioner post-conviction relief in the form of a new trial.

I. HISTORY

1. On September 17, 1998, following a bench trial before the Honorable Rayford A. Means, the Petitioner was found guilty of Attempted Murder, Aggravated Assault, Possession of an Instrument of Crime, Violation of the Uniform Firearms Act, Criminal Conspiracy, and Recklessly Endangering

Another Person. Tariq K. El-Shabazz, Esquire represented the Petitioner at trial.

2. The Commonwealth presented evidence establishing that on August 26, 1997 at 10:00 a.m. Dante Hunter was shot while driving his car down 43rd Street in West Philadelphia. Mr. Hunter testified that Petitioner and his co-defendants, Hakim Lewis and Ricky Mallory, were the individuals that shot at his car. Both the victim and the defendants were alleged to be associates in a large, ongoing drug trafficking scheme.

3. On October 5, 1998, post-verdict motions were denied and Judge Means sentenced Petitioner to an aggregate sentence of forty-five (45) to ninety (90) years. On December 3, 1998, this sentence was reduced to thirty-five (35) to seventy (70) years.[1] On January 29, 1999, Petitioner's Motion for Reconsideration based on After Discovered Evidence was heard and denied, and on February 11, 1999 post sentencing motions were denied. On February 25, 1999 Petitioner filed an appeal to the Pennsylvania Superior Court, which affirmed his judgment of sentence on April 19, 2000. On September 5, 2000, Petitioner's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was

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[1]Petitioner had initially been sentenced to ten (10) to twenty (20) years on the Aggravated Assault charge, however, this was vacated.

denied. F. Emmett Fitzpatrick, Esquire represented Petitioner on direct appeal.

4. On November 28, 2001, Petitioner filed a *pro se* petition for relief under the Post Conviction Relief Act. Burton Rose, Esquire, was appointed as counsel in the matter, and filed an amended petition on November 26, 2002 alleging Petitioner did not voluntarily and knowingly waive his constitutional right to a jury trial. Testimony was heard on November 25 and December 4, 2003, and on March 2, 2004 this Court granted Petitioner's request for relief in the form of a new trial. The Commonwealth now appeals.

II. DISCUSSION

After reviewing the available record, this Court finds that the trial court erred in not conducting an on-the-record colloquy of Petitioner's waiver of a jury trial, and therefore Petitioner's waiver was not knowing and intelligent and was in violation of the Sixth Amendment. Therefore, the PCRA Court properly granted Petitioner's request for relief in the form of a new trial.

A. *Standard of Review on Appeal*

Review by an appellate court of the trial court's disposition of a post conviction petition is "limited to determining whether the court's findings were supported by the record and the court's

order is otherwise free of legal error. The findings of the post conviction court will not be disturbed unless they have no support in the record." *Commonwealth v. McCord*, 644 A.2d 1206, 1209 (Pa. Super. 1994), app. denied, 673 A.2d 332 (Pa. 1996) (quoting *Commonwealth v. Granberry*, 644 A.2d 204, 207 (Pa. Super. 1994)).

B. *Failure of Trial Judge to Conduct On-the-Record Colloquy of Waiver of Jury Trial*

Pennsylvania's Rules of Criminal Procedure provide that in all cases, a defendant may waive a jury trial with approval by a judge of the court in which the case is pending, and elect to be tried by a judge without a jury.[2] The judge shall ascertain from the defendant whether the defendant's waiver is voluntary. The waiver shall be in writing, made a part of the record, signed by the defendant, the judge, and the defendant's attorney, as a witness. *Commonwealth v. Johnson*, 771 A.2d 751, 757 (Pa. 2001).

The Pennsylvania Supreme Court has held that a voluntary waiver of a trial by jury is knowing and intelligent when the on-the-record colloquy indicates that the defendant knew the essential ingredients of a jury trial that are necessary to

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[2]Pa.R.Crim.P. 620 (West, 2004).

understand the significance of the right being waived. *Johnson*, 771 A.2d at 757. The essential ingredients are the requirements that the jury be chosen from members of the community, that the verdict be unanimous, and that the accused be allowed to participate in the selection of the jury panel. *Id.*

In this case, the trial judge did not conduct an on-the-record colloquy with the defendant. Rather, the judge addressed defense counsel for Petitioner directly as to the defendant's waiver of the jury trial. The first time Judge Means addressed counsel was to ask if the case was proceeding as a waiver trial.[3] This inquiry was answered in the affirmative by the Assistant District Attorney (hereinafter "ADA").[4] The Judge then asked if the waiver colloquies were done and signed by the ADA, to which the ADA responded "yes."[5] A short time later, after counsel for one of Petitioner's co-defendants volunteered that his waiver of colloquy form was signed, Judge Means responded by stating "I have signed the colloquy on Hakim Lewis, Braheem Lewis, and Ricky

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[3]NT. 9/15/98, at 5.

[4]*Id.*

[5]*Id.*

Mallory."[6] This concluded all on-the-record discussion of the defendant's jury waiver, in a case that had been listed for months for a five (5) day jury trial.

By proceeding in this fashion, the defendant was unable to express to the court that he had not truly wanted to waive his right to a jury trial. Had Judge Means conducted an on-the-record colloquy, Petitioner would have had an opportunity to state to the Court that he was not willing to waive his right to a jury trial. The Court, being aware of Petitioner's wishes, could have taken the necessary steps to remedy the situation immediately. Petitioner's testimony that he did not wish to proceed with a waiver trial, but was not told by his attorney that it was ultimately his decision, shows that his waiver was not voluntary.

The Commonwealth advances the argument that an on-the-record colloquy was unnecessary because Petitioner read and signed the written jury waiver form. However, as the relevant case law clearly dictates, an on-the-record colloquy must supplement the written waiver.[7] Furthermore, Petitioner's written waiver would also be insufficient to constitute a knowing and intelligent waiver

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[6]*Id.* at 8.

[7]*See* Pa.R.Crim.P. 620; *Commonwealth v. Johnson*, 771 A.2d 751, 758 (Pa. 2001).

because the document signed by the Petitioner and trial counsel was not signed by Judge Means. In addition, as Petitioner testified at his P.C.R.A. hearing, he had "a quick second"[8] to discuss the document that the Commonwealth has referred to as an "extensive six-page, 42 item written jury trial waiver colloquy"[9] with his attorney before he had to sign it.[10] Petitioner testified that his attorney never told him that the decision to proceed without a jury was his alone,[11] and in this Court's estimation, a "quick second" is clearly an insufficient period of time for Petitioner to have fully read and understood the complex waiver document prior to signing away his Sixth Amendment right to a jury trial.

C. *Ineffectiveness of Appellate Counsel*

Beginning with the assumption that trial counsel was effective,[12] a Petitioner's claims of ineffective assistance of counsel under the P.C.R.A. must be evaluated using the three-prong test from

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[8]N.T. 11/24/03 (P.C.R.A.), at 43.

[9]Commonwealth Motion to Dismiss, 6/4/03, at 13.

[10]N.T. 11/24/03 (P.C.R.A.), at 10.

[11]*Id.* at 44.

[12]*Commonwealth v. Breakiron*, 729 A.2d 1088 (Pa. 1999).

Commonwealth v. Pierce.[13] If the Petitioner can not show how the results of his trial would have been different had counsel not erred, his Petition must fail.

In this case, Petitioner testified that he wished to have his case proceed in front of a jury, although he eventually yielded to trial counsel's insistence on a bench trial.[14] However, the proper safeguards were not in place to ensure that his waiver was knowing and intelligent. Appellate counsel failed to raise the issues of the missing jury waiver colloquy and of trial counsel's ineffectiveness for failing to object to the absence of the colloquy.[15] The fact that no colloquy took place on the

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[13]In order to prove that ineffective assistance of counsel resulted in an unjust conviction or sentence pursuant to 42 Pa. C.S.A. § 9543(a)(2)(ii), a Petitioner must set forth the following:

i. The underlying claim has arguable merit;
ii. Counsel's act or omission was not reasonably designed to advance the defendant's interests;
iii. There is a reasonable probability that but for the errors of counsel the result would have been different.

Commonwealth v. Pierce, 645 A.2d 189 (Pa. 1994).

[14]N.T. 11/24/03 (P.C.R.A.), at 55.

[15]Petitioner's direct appeal to the Superior Court was (continued...)

record resulted in Petitioner's waiver being unknowing and unintelligent. This is an issue of merit, and the failure to raise it was not the result of a strategy reasonably designed to advance Petitioner's interests.[16] Therefore, appellate counsel erred in not bringing this issue out on direct appeal, and provided ineffective assistance to Petitioner.

III. CONCLUSION

For the reasons set forth above, post-conviction relief was properly granted.

BY THE COURT:

/s/
D. Webster Keogh, J.

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[15](...continued)
decided on April 19, 2000, almost two years before *Commonwealth v. Grant* (813 A.2d 726 (Pa. 2002)) was decided. Therefore, the direct appeal stage remained the proper time to raise the claim of trial counsel's ineffectiveness, according to *Commonwealth v. Hubbard* (372 A.2d 687 (Pa. 1977) overruled in part by *Grant*, 813 A.2d at 738).

[16]When asked at the P.C.R.A. hearing "was there any tactic or strategy upon which you might have omitted that claim" counsel replied "no." N.T. 12/4/03 (P.C.R.A.), at 32.

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT
OF PENNSYLVANIA
TRIAL DIVISION – CRIMINAL SECTION

COMMONWEALTH	:	**JULY TERM, 1998**
	:	**NO. 0777**
	:	
vs.	:	
	:	**SUPERIOR**
	:	**COURT NO.**
HAKIM LEWIS	:	**872 EDA. 2004**

O P I N I O N

KEOGH, J. **JUNE 29, 2004**

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I. HISTORY

1. On September 17, 1998, following a bench trial before the Honorable Rayford A. Means, the Petitioner was found guilty of Attempted Murder, Aggravated Assault, Possession of an Instrument of Crime, Violation of the Uniform Firearms Act, Criminal Conspiracy, and Recklessly Endangering

Another Person. Guy Sciolla, Esquire represented the Petitioner at trial.

2. The Commonwealth presented evidence establishing that on August 26, 1997 at 10:00 a.m. Dante Hunter was shot while driving his car down 43rd Street in West Philadelphia. Mr. Hunter testified that Petitioner and his co-defendants, Braheem Lewis and Ricky Mallory, were the individuals that shot at his car. Both the victim and the defendants were alleged to be associates in a large, ongoing drug trafficking scheme.

3. On October 5, 1998, post-verdict motions were denied and Judge Means sentenced Petitioner to an aggregate sentence of forty-five (45) to ninety (90) years. On December 3, 1998, this sentence was reduced to thirty-five (35) to seventy (70) years.[1] On January 29, 1999, Petitioner's Motion for Reconsideration based on After Discovered Evidence was heard and denied, and on February 11, 1999 post sentencing motions were denied. On February 25, 1999 Petitioner filed an appeal to the Pennsylvania Superior Court, which affirmed his judgment of sentence on April 19, 2000. On September 5, 2000, Petitioner's Petition for Allowance of Appeal to the Pennsylvania Supreme Court was

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II. DISCUSSION

After reviewing the available record, this Court finds that the trial court erred in not conducting an on-the-record colloquy of Petitioner's waiver of a jury trial, and therefore Petitioner's waiver was not knowing and intelligent and was in violation of the Sixth Amendment. Therefore, the PCRA Court properly granted Petitioner's request for relief in the form of a new trial.

A. *Standard of Review on Appeal*

Review by an appellate court of the trial court's disposition of a post conviction petition is "limited to determining whether the court's findings were supported by the record and the court's

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B. *Failure of Trial Judge to Conduct On-the-Record Colloquy of Waiver of Jury Trial*

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In this case, the trial judge did not conduct an on-the-record colloquy with the defendant. Rather, the Judge addressed defense counsel for Petitioner directly as to the defendant's waiver of the jury trial. The first time Judge Means addressed counsel was to ask if the case was proceeding as a waiver trial.[3] This inquiry was answered in the affirmative by the Assistant District Attorney (hereinafter "ADA").[4] The Judge then asked if the waiver colloquies were done and signed by the ADA, to which the ADA responded "yes."[5] A short time later, after Petitioner's counsel volunteered that his waiver of colloquy form was signed, Judge Means responded by stating "I have signed the colloquy on Hakim Lewis, Braheem

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Lewis, and Ricky Mallory."[6] This concluded all on-the-record discussion of the defendant's jury waiver, in a case that had been listed for months as a five (5) day jury trial.

By proceeding in this fashion, the defendant was unable to express to the court that he had not truly wanted to waive his right to a jury trial. Petitioner testified that he only waived his right to a jury trial because he believed that he had no other choice.[7] Had Judge Means conducted an on-the-record colloquy, Petitioner would have had an opportunity to state to the Court that he was not willing to waive his right to a jury trial. The Court, being aware of Petitioner's faulty belief could have taken the necessary steps to remedy the situation immediately. The fact that Petitioner was operating under an erroneous assumption that could have been uncovered and remedied by the trial court, in addition to Petitioner's testimony that he did not wish to proceed with a waiver trial, shows that his waiver was not voluntary.

The Commonwealth advances the argument that an on-the-record colloquy was unnecessary because Petitioner read and signed the written jury waiver form. However, as the relevant case law

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[6]*Id.* at 8.

[7]N.T. 11/24/03 (P.C.R.A.), at 18.

clearly dictates, an on-the-record colloquy must supplement the written waiver.[8] Furthermore, as Petitioner testified at his P.C.R.A. hearing, he was given what the Commonwealth has referred to as an "extensive six-page, 42 item written jury trial waiver colloquy"[9] while sitting in the courtroom with Judge Means already on the bench waiting to begin the proceedings.[10] Petitioner testified that he did not read the waiver form,[11] and in this Court's estimation, this was clearly not a situation conducive to Petitioner being able to fully read and understand the complex waiver document prior to signing away his Sixth Amendment right to a jury trial.

C. *Ineffectiveness of Appellate Counsel*

Beginning with the assumption that trial counsel was effective,[12] a Petitioner's claims of

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[8]*See* Pa.R.Crim.P. 620; *Commonwealth v. Johnson*, 771 A.2d 751, 758 (Pa. 2001).

[9]Commonwealth Motion to Dismiss, 6/4/03, at 13.

[10]N.T. 11/24/03 (P.C.R.A.), at 7, 10.

[11]*Id.* at 18. It is also of note that Petitioner only advanced to the ninth grade in school, as is also noted on the waiver itself. *Id.*

[12]*Commonwealth v. Breakiron*, 729 A.2d 1088 (Pa.

(continued...)

ineffective assistance of counsel under the P.C.R.A. must be evaluated using the three-prong test from *Commonwealth v. Pierce*.[13] Thus, if the Petitioner can not show how the results of his trial would have been different had counsel not erred, his Petition must fail.

In this case, Petitioner alleged that he wished to have his case proceed in front of a jury, although he eventually yielded to trial counsel's insistence on a bench trial.[14] However, the proper safeguards were not in place to ensure that his waiver was knowing and intelligent. Appellate counsel failed to raise the issue of the missing jury waiver colloquy and the ineffectiveness of trial

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[12](...continued)
1999).

[13]In order to prove that ineffective assistance of counsel resulted in an unjust conviction or sentence pursuant to 42 Pa. C.S.A. § 9543(a)(2)(ii), a Petitioner must set forth the following:

i. The underlying claim has arguable merit;
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Commonwealth v. Pierce, 645 A.2d 189 (Pa. 1994).

[14]N.T. 11/24/03 (P.C.R.A.), at 18.

counsel for failing to object to the absence of the colloquy.[15] The fact that no colloquy took place on the record resulted in Petitioner's waiver being unknowing and unintelligent. This is an issue of merit, and the failure to raise it was not the result of a strategy reasonably designed to advance Petitioner's interests.[16] Therefore, appellate counsel erred in not bringing this issue out on direct appeal, and provided ineffective assistance to Petitioner.

III. CONCLUSION

For the reasons set forth above, post-conviction relief was properly granted.

BY THE COURT:

/s/
D. Webster Keogh, J.

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[15]Petitioner's direct appeal to the Superior Cou rt was decided on April 19, 2000, almost two years before *Commonwealth v. Grant* (813 A.2d 726 (Pa. 2002)) was decided. Therefore, the direct appeal stage remained the proper time to raise the claim of trial counsel's ineffectiveness, according to *Commonwealth v. Hubbard* (372 A.2d 687 (Pa. 1977) overruled in part by *Grant*, 813 A.2d at 738).

[16]When asked at the P.C.R.A. hearing "was there any tactic or strategy upon which you might have omitted that claim" counsel replied "no." N.T. 12/4/03 (P.C.R.A.), at 32.

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(2)

No. 08-94

FILED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

RICKY MALLORY, BRAHEEM LEWIS and HAKIM LEWIS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The Respondents were convicted in the Court of Common Pleas of Philadelphia as per CP 97-09-1109 (Braheem Lewis), CP 98-07-0777 (Hakim Lewis) and CP 98-02-0065 (Ricky Mallory) following a non-jury trial before the Honorable Rayford Means. On October 5, 1998, Judge Means sentenced each of these Respondents to a term of not less than 35 nor more than 70 years imprisonment. Direct review was provided but relief was denied by the Superior Court of Pennsylvania. The Supreme Court of Pennsylvania denied Allowance of Appeal on September 5, 2000.

On November 27, 2001, the present PCRA Petition was filed raising several claims of ineffective assistance of prior counsel, among which was the claim that the Petitioner's federal and state constitutional right to a trial by jury had been abridged because their proffered waiver of jury trial was not voluntary. In that regard, the Lewis Respondents alleged that this issue was ineffectively omitted in their direct appeal to the Superior Court.

The Honorable D. Webster Keogh of the Court of Common Pleas conducted evidentiary hearings in these matters in 2004 and granted a new trial by Order dated March 2, 2004. The prosecution filed an

appeal and the Superior Court of Pennsylvania reversed on November 12, 2005. *Commonwealth v. Mallory, et al*, 888 A. 2d 854 (Pa. Super. 2005). Respondents filed a Petition for Reargument En Banc but the same was denied by Order dated January 12, 2006.

The Supreme Court of Pennsylvania granted the Respondents' Petition for Allowance of Appeal on June 6, 2006. The case was argued before the Supreme Court of Pennsylvania and the matter was held under advisement until February 19, 2008, when, in an Opinion by Chief Justice Ronald Castille, the Supreme Court reversed the Order of the Superior Court and remanded the matter to the PCRA court for further proceedings. 941 A. 2d 686 (Pa. 2008).

STATEMENT OF REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI FILED BY THE COMMONWEALTH OF PENNSYLVANIA

The Commonwealth of Pennsylvania has filed a Petition for a Writ of Certiorari with this Court, raising the question as to whether a criminal defendant can establish ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984), for failing to ensure a valid jury trial waiver, without a requirement that the ineffective assistance had any effect on the verdict. The Respondents respectfully submit that this matter is not presently worthy of review before this Court since the ruling of the Supreme Court of Pennsylvania has resolved nothing about this case but has merely remanded the matter to the Post Conviction Relief Act Court for further evidentiary hearings, and has done so with state rules and procedures in mind. In addition, the Respondents note that the Supreme Court of Pennsylvania has decided this case entirely consistent with controlling United States Supreme Court precedent, including *Strickland v. Washington, supra.*

THE DECISION OF THE PENNSYLVANIA SUPREME COURT WAS NOT INCONSISTENT WITH THIS COURT'S PREVIOUS RULINGS

The Supreme Court of Pennsylvania held that when a defendant seeks to collaterally attack his waiver of a jury trial on the ground that it was caused by ineffective assistance of counsel, with respect to the issue of prejudice under *Strickland*, supra, what the defendant must demonstrate is that there exists a reasonable probability that "the outcome of the waiver proceeding would have been different" (App.42). The Pennsylvania Supreme Court therefore remanded this matter for further proceedings, based upon that holding.

The Respondents' respectfully submit that this Court's decision in *Hill v. Lockhart*, 474 U.S. 52 (1985) was fairly and properly interpreted by the Supreme Court of Pennsylvania in this case. In *Hill*, this Court focused not on whether the result of a trial would have been different had the Petitioner not pleaded guilty, but rather what was the result of the guilty plea process itself. See also *Lockhart v. Fretwell*, 506 U.S. 364 (1993), where this Court stated that the prejudice component of the *Strickland* test focuses not merely on outcome determination but on whether the result of the proceeding in question was unfair, unreliable or defective. Subsequent to the decision in *Hill v. Lockhart*, supra, this Court decided *Roe v Flores-Ortega*, 528 U.S. 470 (2000) and *Florida v. Nixon*, 543 U.S. 175 (2004). In *Roe*, this Court affirmed the principle that the ineffective assistance of counsel in failing to file a requested appeal entitled a defendant

to a new appeal "without showing that his appeal would likely have had merit". Id. at 470. The Court stated that no specific showing of prejudice is required where counsel's ineffectiveness lead not to a judicial proceeding of disputed reliability but rather to the forfeiture of the proceeding itself. Id. at 483. In the context of an appeal, which the accused wanted to have and to which he had a right to have, the loss of the constitutional right itself was the prejudice to the defendant. Accordingly, under *Roe,* all that the defendant has to show is that he would have appealed but for counsel's deficient performance, not that the appeal would have had a successful result. In reaching that conclusion, the court specifically relied upon *Hill v. Lockhart,* supra, as well as *Rodriquez v. United States,* 395 U.S. 327 (1969). Id at 485. Importantly, the Court compared the decision whether to appeal to the decision whether to plead guilty, and noted that both involve a decision personal to the defendant. The same is true with respect to the decision whether or not to waive the right to jury trial. *Duncan v. Louisiana,* 39 U.S. 145 (1968) (defendant has federal constitutional right to a jury trial through the 14th Amendment). If in the context of a guilty plea ("waiver of trial") or a waiver of an appeal, where there is a claim of ineffective assistance of counsel, the defendant only has to show that there is a reasonable probability that otherwise the defendant would have exercised the constitutional right in

question (i.e., to plead not guilty or to take an appeal), the same analysis should apply with respect to the decision to proceed with or to waive a jury trial. Thus the prejudice analysis in such cases would be limited to determining whether or not at the stage of the proceedings involved (here, the jury waiver decision), there would have been a different outcome but for the ineffective assistance of counsel.

In *Roe*, the Court concluded that it would impose too heavy a burden on a defendant to have to prove that he would have had a successful appeal in order to recover that lost right; rather, the Court only requires that the defendant demonstrate that, but for counsel's deficient conduct, he would have pursued that right.

In *Florida v. Nixon*, supra, the Court was faced with a situation where defense counsel had failed to obtain the defendant's express consent to a strategy of conceding guilt at the guilt phase of a capital trial. The Court concluded that this failure did not automatically render counsel's performance constitutionally inadequate. The Court cited its earlier decision in *Jones v. Barnes*, 463 U.S. 745 (1983) for the proposition that only a defendant can determine whether to plead guilty, waive a trial by jury, testify in his own behalf or take an appeal. The Court observed that as to these decisions, the law is not focusing on a tactic or a strategic choice; rather, these are matters of the highest stakes for an accused requiring "the utmost solicitude". Id. at 187.

An attorney's tactical concession of his client's guilt represents a strategic trial decision subject to a normal prejudice requirement as set forth in *Strickland*, supra, that is, that the outcome of the trial itself would have been different had the attorney acted differently.

Accordingly, the Respondents respectfully submit that the instant situation does not present a claim of "trial error", or an error which occurred during the presentation of a case to the jury and which therefore could be quantitatively assessed in the context of other evidence presented in order to determine whether or not the outcome of the trial would have been different. *Arizona v. Fulminante*, 499 U.S. 279, 308 (1991). This case presents a situation where, like the right to plead not guilty and the right to pursue a direct appeal, the Respondents were, as a result of ineffective assistance of counsel, deprived of a federal and state constitutional right. In such a situation, as this Court has already made clear, the Respondents cannot be asked to prove that the outcome of a jury trial would have been different than the outcome of the non-jury trial that they actually had. Rather, what the Respondents can be requested to prove, and hope to do so upon remand, is that had counsel provided effective assistance, they would most assuredly had requested a jury trial. *Duncan v. Lousiana*, supra at 156 ("If the defendant preferred the common sense judgment of a jury to the more

tutored but perhaps less sympathetic reaction of the single judge, he was to have it.").

In this case, the Respondents ending up forfeiting an entire judicial proceeding, to wit, their federal and state constitutional right to a trial by jury. To establish prejudice under *Strickland*, a Respondent need only demonstrate that the outcome of that jury waiver proceeding would have been different, not that he would have been found not guilty had there been a trial by jury. No petitioner can meet that standard because any argument to that effect would be based completely upon speculation. Although the Respondents have contended throughout this litigation that the absence of a jury trial should be viewed as a "structural error" for which prejudice should be presumed, the decision of the Supreme Court of Pennsylvania refused to accept the Respondents' argument that like reasoning in *McGurk v. Stemberg*, 163 F. 3d 470 (8th Cir. 1998) should be adopted in this case.[1] In rejecting *McGurk*, the

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[1] See also *Waller v. Georgia*, 467 U.S. 39 (1984) (the right to a public trial falls in the category of constitutional errors which are not subject to harmless error); *McCaskle v. Wiggins*, 465 U.S. 168 (1994) (same as to the right to self-representation at trial); *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006) (same as to right to counsel of choice); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (same as to denial of the right to a jury verdict of guilty beyond a reasonable doubt) and *Deck v. Missouri*, 544 U.S. 622 (2005) (same as to shackling of

Opinion of Chief Justice Castille specifically states that "actual prejudice must be shown" where a criminal defendant claims that, as a result of ineffective assistance, he has lost his right to trial by jury. The Supreme Court of Pennsylvania went on to determine that the "actual prejudice" must be related to "the proceeding" in dispute, to wit, the jury waiver proceedings, and not the ultimate trial (App.38).

The lower court's conclusion that a criminal defendant does not have to demonstrate that the outcome of the jury trial would have been more favorable than the bench trial that he had is appropriate based upon this Court's precedents discussed above. As in *Hill v. Lockhart*, supra, the focus must be on the outcome of the proceeding at hand, not that the trial result would have been different.

THE DECISION OF THE PENNSYLVANIA SUPREME COURT DOES NOT REPRESENT A FINAL RULING ON AN ISSUE OF FEDERAL CONSTITUTIONAL LAW.

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defendant at a jury trial). Each of these constitutional deprivations is a structural defect affecting the framework in which the trial proceeds, rather than simply an error in the trial process itself. The same should be true as to the right to a trial by jury.

The mandate of the Supreme Court of Pennsylvania was simply to allow the PCRA court to focus on the totality of the circumstances that impacted upon the jury trial waiver. A remand was deemed necessary because the PCRA court had relied on the absence of an oral waiver colloquy with the trial court for too great of an extent (App.43). Thus this was clearly a matter of interpretation of Pennsylvania procedural rules, as was discussed in the Supreme Court of Pennsylvania's Opinion (see App.21-25).

This Court has repeatedly stated that where the judgment of a state court rests upon two grounds, one of which is federal and the other non federal in character, the Court has no jurisdiction to review the judgment if the non- federal ground is independent of the federal ground and adequate to support the judgment. *Michigan v. Long*, 463 U.S. 1032, 1039 (1983).

Therefore, this Court should refuse to review this case in light of the standards set forth in Rule 10(b) of the rules of this Court. Under 28 U.S. Code §1257(a), this Court possesses jurisdiction to review state court determinations only to the extent that they rest upon federal law. *Oregon v. Guzek*, 546 U.S. 517, 521 (2006).Accordingly, this Court should allow this case to proceed with that remand order so that, as a matter of state law and procedure, the PCRA court can determine whether or not the waiver of jury trial that was offered in this case

should be set aside as a result of ineffective assistance of counsel. There is no need for the lower court to also decide whether or not the outcome of a jury trial, had one occurred, would have been different than the outcome of the non-jury trial that actually took place. That would be guesswork, not legal analysis. [2]

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[2] It would also mean that no defendant could ever prevail in a claim of ineffective assistance related to the jury waiver proceedings, as the defendant's burden of proof would be "insurmountable". See Justice Saylor's dissenting Opinion in *Commonwealth v. Lassiter*, 722 A. 2d 657, 664 (Pa. 1998), *United States v. Owens*, 483 F. 3d 48 (1st Cir. 2007) (prejudice presumed from ineffectiveness in failing to preserve a claim that defendant denied right to a public trial because that error would almost always be held to be harmless, and thus "its denial would be without consequence") and *United States v. Gonzales Lopez*, supra at 2565 (Court will not require defendant "to speculate upon what matters the rejected counsel would have handled differently").

CONCLUSION

The Respondents respectfully submit that in this case, the Supreme Court of Pennsylvania followed this court's jurisprudence in *Strickland* and other cases by ruling that "actual prejudice" must be shown but that under Pennsylvania rules and laws, the analysis provided so far by the PCRA court was not adequate. The ruling of the Supreme Court of Pennsylvania did not hold that there should be a presumption of prejudice on the structural error theory advanced by counsel for the Respondents; rather, the Supreme Court of Pennsylvania has merely ruled that the defendant must show "actual prejudice" with regard to the jury waiver proceeding and not the trial. Since that conclusion is consistent with *Hill v. Lockhart*, supra, *Roe v. Flores-Ortega*, supra and *Strickland*, supra, there is no justification for further delay in this case by review being granted in this Court. Therefore, the Commonwealth's Petition should be denied.

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No. 08-94

IN THE
SUPREME COURT OF THE UNITED STATES

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

RICKY MALLORY, BRAHEEM LEWIS, and HAKIM LEWIS,
Respondents

On Petition for Writ of Certiorari to the Pennsylvania Supreme Court

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Reply Argument

I. The brief in opposition serves only to emphasize the importance of the *Strickland* prejudice question before the Court.

The question presented is whether a criminal defendant can establish ineffective assistance of counsel merely by asserting "prejudice" as to a specific stage of the trial, without showing that the alleged ineffectiveness had any effect on the verdict or sentence. Respondents' answer – a resounding but unreasoned "yes" – demonstrates the need for this Court's review.

Respondents maintain that their ineffectiveness claim – that counsel failed to shepherd them properly through the jury waiver process – is just like a claim that counsel was ineffective in relation to a guilty plea, or in failing to file a notice of appeal. Therefore, say respondents, this case is easily controlled by *Hill v. Lockhart*, 474 U.S. 52 (1985), and *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), and there is no cert-worthy issue. Brief in Opp. at 4-6.

Apparently, however, the application of these precedents to the question presented here is somewhat less obvious than respondents now

insist, because this is the first time they have cited either *Hill* or *Roe* since the prosecution began. In fact, federal and state courts are in disarray about the nature of the prejudice assessment in the context of both jury waiver ineffectiveness claims, Certiorari Pet. at 12-15, and guilty plea ineffectiveness claims, Certiorari Pet. at 20-22. Respondents do not even attempt to address these lower court conflicts.

Rather, respondents simply declare that their lawyers' conduct caused them to "forfeit[ ] an entire judicial proceeding," Brief in Opp. at 8, and thus that they should not have to show real prejudice, in the form of an effect on the outcome of the trial they received.

But this is circular reasoning. The whole question here is whether respondents' decision to take a bench trial rather than a jury trial can be treated as "the result of the proceeding" for purposes of assessing prejudice under *Strickland v. Washington*, 466 U.S. 668, 694 (1984). *See* Certiorari Pet. at 7-11. Respondents did, after all, have a trial: a three-day trial, with multiple witnesses, lengthy cross-examination, and extensive closing arguments. That is hardly the same as a defendant who has no appeal at all because his lawyer neglects to file the necessary notice. If what respondents want is a new trial, they must show that the one they already had did

not "produce[ ] a just result." *Strickland*, 466 U.S. at 686.

Respondents nonetheless contend that they should not have to prove full prejudice because their ineffectiveness claim is not merely one of "'trial error', or an error which occurred during the presentation of a case." Instead, counsel allegedly deprived them of their independent constitutional right to a jury trial. Brief in Opp. at 7.

This is an empty distinction. There are many constitutional rights, independent of the right to effective counsel, that involve the conduct of a trial. These include the right to testify or not to testify, the right to confront witnesses, the right to compel process, and the right to present defense evidence. All of these can be lost through an attorney's actions. Yet, when counsel's conduct allegedly prevents the defendant from testifying, or calling a witness, or presenting a defense, there can be no serious argument that he is entitled to a presumption of prejudice. *See* Certiorari Pet. at 22-24. Instead he must show that the missed opportunity affected the outcome of the trial in light of all the evidence.

Respondents insist, however, that the nominal showing required by the court below really was "actual prejudice," not just presumed prejudice. Brief in Opp. at 8-9. But calling it so does not make

it so. If this is not presumption of prejudice, what would be?

Paradoxically, respondents place great reliance on *Florida v. Nixon*, 543 U.S. 175 (2004), a case in which the Court refused to presume prejudice. Respondents contend that their situation is distinguishable. Brief in Opp. at 6-7. That argument, however, in effect concedes that the presumption of prejudice is exactly what respondents are seeking.

The *Florida v. Nixon* decision, moreover, presented a far stronger basis for presuming prejudice than does respondents'. The Court made clear that a presumption of prejudice is "reserved for cases in which counsel fails meaningfully to oppose the prosecution's case." 543 U.S. at 179. But there the trial lawyer explicitly *conceded guilt*, contesting only the penalty phase, and still did not merit a presumption of prejudice. Here, by contrast, all three lawyers fought vigorously at the trial, which consisted largely of their objections, cross-examination, and argument. The fact that they advised their clients to accept the judge as fact finder does not conceivably constitute a failure to meaningfully oppose the prosecution's case.

Finally, respondents argue that they should not be required to show prejudice to the outcome of trial because it is too hard to do. They protest that any such effort would require "speculation." Brief

in Opp. at 8, 11. But that is always true of *Strickland* prejudice analysis. The defendant contends that his lawyer should have done something differently, and the court attempts to determine what the effect would have been. The inquiry is inherently inferential.

What respondents really seem to mean, however, is that actual prejudice is too hard to show because it infrequently exists in the jury waiver ineffectiveness context. But that is no cause to dispense with the prejudice prong. The Court did not create the presumption of prejudice in order to relieve defendants of a burden they would otherwise have difficulty meeting; on the contrary, the presumption was intended for "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Untied States v. Cronic*, 466 U.S. 648, 658 (1984).

The decision to be tried by a judge rather than a jury will seldom affect the verdict to the defendant's detriment, as long as the fact finder is fair; and if not, then the defendant is properly required to provide some evidence of bias in order to establish ineffective assistance of counsel. That is as it should be. Review is warranted to settle the question.

II. The ruling below was plainly final under this Court's controlling precedent, and was not based on state law.

Respondents assert that the state supreme court "merely remanded" the matter for further proceedings, that its ruling is not final, and that the case therefore is not properly before this Court. *See* Brief in Opp. at 3 (second sentence), 9 (argument heading).

Respondents cite no law for their argument, but directly applicable authority, in another case arising from the Pennsylvania Supreme Court, negates the claim. In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), the Court granted review of a state supreme court Sixth Amendment ruling. The state court holding was that the defendant had a constitutional right to review the confidential file compiled by a child protective services agency investigating a child abuse claim.

The defendant argued in this Court that jurisdiction was lacking. The ruling below was not final, contended the defendant, because the state court mandate merely remanded the case to the trial judge to allow review of the file, to determine whether any of its contents might have aided the defense, and if so to grant a new trial.

This Court rejected the finality challenge. The Court concluded that, if the remand went forward, there would be no practical way for the Commonwealth to achieve review of the Sixth Amendment ruling in question. Under any permutation of possible results, the Commonwealth would at best be forced to re-argue constitutional questions that the state courts had already resolved, and that would be subject to law-of-the-case bars there, unless and until this Court re-granted certiorari on the exact issue that was already before it. "The goals of finality would be frustrated, rather than furthered, by these wasteful and time-consuming procedures." 480 U.S. at 48.

This case is in precisely the same posture. As in *Ritchie*, the state supreme court has announced its views on the federal constitutional standard to be applied to respondents' ineffective assistance claim, and has remanded only for application of the standard by the trial judge. App. 42-44. Win or lose on the facts, the Commonwealth can receive no further review in the state courts on the constitutional question now before this Court. This Court need not defer its consideration merely because of the theoretical possibility that the case could reach it again after years of additional proceedings. *Ritchie* disposes of respondents' finality challenge.

Respondents also charge that this Court lacks jurisdiction because the ruling below rests on

an independent state ground. According to respondents, the state supreme court decision was really just an application of the state procedural rule calling for jury waiver colloquies. Brief in Opp. at 10-11.

The claim is untenable. In reality, the state supreme court discussed its procedural rule only to hold that the trial judge had erred in relying on it to determine what were really constitutional issues. App. 22-24.[1] That is why the court spent the next 20 pages of its opinion discussing federal questions, without further reference to state procedural rules. Respondents have gotten it exactly backwards.

The case is properly before this Court.

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[1] "A waiver colloquy is a procedural device; it is not a constitutional end or a constitutional 'right.' . . . The right to a jury trial in criminal cases, unlike the Rule-based requirement of a waiver colloquy, does implicate constitutional concerns." App. 23-24.

Conclusion

For the reasons set forth above and in the certiorari petition, petitioner respectfully requests that this Court grant the petition for writ of certiorari.

Respectfully submitted,

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